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MSHA V. WESTWOOD ENERGY PROPERTIES

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

December 20, 1989

SECRETARY OF LABOR, Docket Nos. PENN 88-42-R
MINE SAFETY AND HEALTH PENN 88-43-R
ADMINISTRATION (MSHA)

PENN 88-73-R thru

v.

PENN 88-89-R

WESTWOOD ENERGY PROPERTIES PENN 88-148

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982) ("Mine Act" or "Act"), and involves the validity of 18 citations and one withdrawal order issued to Westwood Energy Properties ("Westwood") concerning conditions at its refuse culm bank. 1/ The question before us is whether the Secretary of Labor ("Secretary") properly issued the citations and the withdrawal order to Westwood under the Mine Act. Commission Administrative Law Judge James A. Broderick upheld the Secretary's action in proceeding against Westwood under the Act. 11 FMSHRC 105 (January 1989)(ALJ). Westwood petitioned for review of the judge's decision asserting that its operations at the culm bank are but one component of the operation of an electric generating facility subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. • 651 et seq. (1982) (the "OSHAAct"), rather than the Mine Act. We granted Westwood's petition and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand for the taking of additional evidence on the important question presented and for the entry of a new decision.

1/ "Culm" is described as "[t]he waste or slack of the Pennsylvania anthracite mines, consisting of fine coal, more or less pure, and coal dust and dirt...." U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 289 (1968).

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Westwood is the owner of land near Tremont, Schuylkill County, Pennsylvania. A culm bank is located on the land, in addition to an electric generating station where electricity is generated by steamdriven turbines. The steam is produced by the burning of material taken from

the culm bank. The culm bank consists of coal mine refuse, including rock, wood, metal, and a small percentage of coal and other carbonaceous material. 11 FMSHRC at 107. The culm bank is 4,500 feet in circumference at the bottom, 350 feet at the top, and approximately 275 feet high. At the time of the hearing before the judge, Westwood had removed 240,000 tons of material from the culm bank.

The land formerly was the site of the Westwood Colliery, an underground anthracite coal mine and processing plant. Underground mining and coal preparation had been conducted at the site for over 30 years, ending in 1947. The culm bank resulted from this mining activity. When the underground mine closed, the coal processing plant was demolished and its remains became part of the culm bank. Sometime after Westwood Colliery had discontinued operations, a company named Manbeck operated a plant at the site, separating fine coal from waste material and selling the coal. Manbeck's operations were inspected by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") and its predecessor agency. Westwood began construction of its electric generating facility in February 1986², and the facility became fully operational in July 1988. Electric power generated at the facility is sold to Metropolitan Edison Company. Westwood bulldozes culm from the top of the bank, and the material is then scooped by a front-end loader. The front-end loader dumps the culm into one of two hoppers or into a truck, which hauls the culm to the hoppers. After being dumped into a hopper, the culm passes through a grid that filters out rock, wood, and other particles larger than 12 inches by 12 inches. The culm next falls onto a conveyor which carries it under a magnet and through metal detecting and removing devices so that metal objects that would damage the equipment can be removed. The culm is then transported by another conveyor to a fuel storage silo where it is stored in bins. The stored material is gradually released from the bins into two "primary crushers," which break the culm into pieces approximately 3/4 inch to 1 inch in diameter. The crushed culm is then transported by conveyors to the power plant where it is crushed to a particle size of 1/8 inch in diameter. After crushing, the culm is transported by conveyors into the combustor, where it is burned. ^{2/} Ash by-products remaining after burning are hauled by truck to an ash pit.

On October 26, 1987, MSHA inspector Joseph Uholic arrived at Westwood's facility to conduct an inspection of the culm bank site. Westwood denied Uholic entry. On October 27, 1987, Uholic returned accompanied by MSHA inspector Charles Rosini and, pursuant to

^{2/} Westwood's combustion process, known as the "circulating fluidized bed process" is a developing technology. The process allows Westwood to efficiently burn the culm without separating fine coal from the remainder of the culm. Tr. 93-94, O.A. Tr. 5.

instructions from their supervisor, the inspectors sought admission to the site. Westwood informed the inspectors that, on the advice of counsel, an inspection would not be permitted because the operation was not subject to MSHA jurisdiction. Uholic issued Westwood a citation charging a violation of section 103(a) of the Mine Act for failure to permit an MSHA inspector to enter. After approximately 40 minutes, Uholic issued a withdrawal order to Westwood for failure to abate the denial of entry violation alleged in the citation. 3/

On November 13, 1987, the Secretary sought and obtained, with Westwood's consent, a temporary restraining order from the United States District Court for the Eastern District of Pennsylvania. The order permits MSHA inspectors to enter and inspect Westwood's facility pending a final adjudication by the Commission of the issue of MSHA jurisdiction.

On November 14, 1987, Uholic and Rosini returned and inspected Westwood's culm bank site. They issued 17 citations charging violations of various mandatory safety standards applicable to surface coal mines. The withdrawal order and several of the citations also contained the inspectors' findings, made pursuant to section 104(d) of the Mine Act, that the violations were of a significant and substantial nature. Westwood contested the validity of the withdrawal order and the citations arguing that the culm bank site is not subject to Mine Act jurisdiction. Westwood also contested the significant and substantial findings and the Secretary's subsequently proposed civil penalties.

Following an evidentiary hearing, the administrative law judge issued his decision upholding the Secretary's assertion of jurisdiction

3/ Section 103(a) of the Act states in part:

Authorized representatives of the Secretary ... shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [Act].... For the purpose of making any inspection or investigation under this [Act], the Secretary ... with respect to fulfilling his responsibilities under this [Act], or any authorized representative of the Secretary ..., shall have a right of entry to, upon, or through any coal or other mine.

30 U.S.C. • 813(a).

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under the Mine Act. The judge stated that "the primary issue in the case is whether Westwood's facility is a mine within the meaning of that term in the Mine Act, and therefore subject to the jurisdiction of MSHA." 11 FMSHRC at 107. The judge noted that while the culm bank would not be considered a mine in ordinary parlance, the statutory definition of "mine" is broad and includes "lands, ...facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground...resulting from the work of extracting... minerals from their natural deposits,...or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals...." 11 FMSHRC at 110; 30 U.S.C. • 802(h)(1). The judge found that the "Westwood culm bank clearly resulted from the work of extracting anthracite coal from its natural deposit in the earth" and that a "literal construction of the statutory language would seem to cover Westwood's culm bank." 11 FMSHRC at 110.

The judge further noted that the statutory definition of "work of preparing the coal" includes "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." 30 U.S.C. • 802(i); 11 FMSHRC at 110. The judge stated that the culm material contains anthracite coal, that Westwood breaks, crushes, sizes, stores and loads the coal in preparation for its use as fuel, and that a literal reading of the statutory definition of "work of preparing the coal" would seem to cover Westwood's operation. 11 FMSHRC at 111.

The judge rejected Westwood's argument that it is outside the coverage of the Mine Act because it is a power plant burning fuel rather than an operation engaged in the production of a marketable mineral. The judge noted that "it is not uncommon for mine operators to themselves consume the product of their mines" and that, in any event, Westwood "does more than burn the culm material; it prepares it 'for a particular use.'" 11 FMSHRC at 115. Finding that Westwood's facility meets the Act's definition of a "coal or other mine" and that Westwood engages in the "work of preparing the coal," the judge concluded that Westwood's facility is subject to the Mine Act. 11 FMSHRC at 115.

The dispute before us concerns the judge's upholding of the Secretary's assertion that the Mine Act applies to Westwood's culm bank operations. The Secretary does not assert jurisdiction under the Mine Act with respect to the working conditions inside the power generating facility itself. The Secretary asserts that working conditions inside the power generation facility are properly regulated by her under the OSHAct. Westwood, on the other hand, asserts that the entire facility, including the culm bank situated on the site, is properly regulated under the OSHAct.

A similar type of question was before us recently in Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989). In Pennsylvania Electric, we concluded that while the Secretary of Labor properly could exercise her authority to apply mine safety standards to the part of the utility operation in dispute therein, the record was unclear as to whether the ~2412

Secretary had, in fact, done so. Therefore, we remanded the matter to the administrative law judge for further proceedings, including the taking of additional evidence on the jurisdictional question and for the entry of a new decision. 11 FMSHRC at 1882-86. Here, for similar reasons, we reach the same conclusion and order the same course of procedure.

As in Pennsylvania Electric, 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. Uery, 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 Ry. Lo. 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). Here, the Secretary claims that MSHA has properly exercised its statutory authority to regulate the culm bank site and that the withdrawal order and citations issued under the Mine Act must therefore be upheld.

Section 4 of the Mine Act provides that each "coal or other mine" affecting commerce is subject to the Act. 30 U.S.C. • 803. Section 3(h) of the Mine Act broadly defines "coal or other mine" as including the area of land from which minerals are extracted, roads appurtenant to such area, lands, facilities, equipment and machines used in, or resulting from, the work of extracting such minerals from their natural deposits, milling, or preparation of coal. 4/ More specifically, the

4/ Section 3(h), 30 U.S.C. 802(h), states:

(1) "[C]oal or other mine" means (A) an area of land from which materials are extracted in nonliquid

form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and

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definition of "coal mine" in section 3(h)(2) includes "land...and other property ... resulting from, the work of extracting in such area ... anthracite from its natural deposits in the earth...and the work of preparing the coal so extracted...."

The parties agree that Westwood's culm bank is comprised of materials resulting from Westwood Colliery's extraction of anthracite coal from its underground coal mine. Accordingly, the culm bank literally falls within the statutory definition of "mine" since "it result[s] from the work of extracting...minerals from their natural deposits...." 30 U.S.C.

□802(h)(1). See Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 213 (4th Cir. 1986)(coal refuse pile is a "mine").

The term "work of preparing the coal" is defined in section 3(i) of the Mine Act as follows:

[1] "Work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storage and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. • 802(i)(bracketed numbers added). The judge found that Westwood in its use of the culm "breaks, crushes, sizes, stores, and loads anthracite" and therefore that Westwood's activities fall within the literal definition of coal preparation set forth in clause [1] of section 3(i). 11 FMSHRC at 115. He further found that Westwood "does other work of preparing coal usually done by the operator of a coal mine" (Id.), therefore meeting clause [2]'s criterion. Westwood argues, however, that the nature of an operation must also be examined when applying the definition of "work of preparing the coal," and that the judge erred in finding its activities to be the type of work usually

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 titles II, III, and IV, "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[.]

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done by the operator of a mine. Westwood particularly takes issue with the judge's conclusion that it "prepares [the culm] 'for a particular use,'" and is therefore subject to the Mine Act. 11 FMSHRC at 115. In *Oliver M. Elam, Jr.*, 4 FMSHRC 5, 7 (January 1982), the Commission recognized that under clause [2] of the definition of "work of preparing the coal" considerations additional to mere performance of the work activities specified in clause [1] come into play in determining whether coal preparation is taking place. The Commission concluded that inherent in the determination whether a company is engaged in coal preparation is an inquiry "not only into whether the operator performs one or more of the listed work activities [of section 3(i)] but also into the nature of the operation performing such activities." *Id.* (Emphasis added). Accord, *Donovan v. Inland Terminals*, 3 BNA MSHC 1893 (S.D. Ind. March 28, 1985). The Commission held in *Elam* that "work of preparing the coal" signifies "a process undertaken to make coal suitable for a particular use or to meet market specifications." 4 FMSHRC at 8. Because the *Elam* operation was an all-purpose commercial dock facility at which coal was stored, broken and crushed simply to facilitate the loading of the coal onto barges for shipment, the Commission concluded that *Elam* did not make the coal suitable for any particular use and was not engaged in the type of coal preparation usually done by a mine operator. *Id.* Therefore, the *Elam* loading dock was found to not be a mine.

Subsequently, in *Alexander Brothers*, 4 FMSHRC 541 (April 1982), the Commission applied the *Elam* holding and found that the Secretary had properly exercised jurisdiction under the Federal Coal Mine Health and Safety Act of 1969 (the "Coal Act"), 30 U.S.C. • 801 et seq. (1976) (amended 1977), in a case involving the reclamation of materials from a refuse pile. The refuse pile had been created during the operation of an underground coal mine. After the mine had been abandoned, *Alexander Brothers* reclaimed coal from the pile. It removed refuse material from the pile by use of a front end-loader and trucked it to a screening plant,

where rocks, scrap metal, and other waste were removed. The remaining refuse was then crushed and transported to a cleaning plant, where the additional non-coal material was removed by various processes and where further crushing took place. The resulting coal was then sold to brokers. The Commission found that the processes undertaken by Alexander Brothers were those specified in the statutory definition of "work of preparing coal." The Commission also found that Alexander Brothers undertook those processes in order to make coal-bearing refuse marketable. Consequently, the Commission concluded that Alexander Brothers was subject to the 1969 Coal Act. 4 FMSHRC at 545. See also *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 584 (3rd Cir. 1979 cert. denied. 444 U.S. 1015 (1980)(operation that separates sand, gravel and a low grade fuel from dredged refuse is subject to Mine Act).

We conclude that Westwood literally engages in the "work of preparing the coal" in that the processes undertaken by Westwood on the mine waste material, including coal, are among those specified in the statutory definition. We further conclude that although Westwood does

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not undertake to prepare the coal contained in the mine refuse to meet market specifications, it does engage in the enumerated processes, as does the normal coal mine operator, for the purpose of making the mined material suitable for a particular use; here, as a fuel to be consumed at an electric generating facility.

Although Westwood further argues that it is exempt from Mine Act jurisdiction because it does not prepare the culm for resale but rather is the ultimate consumer of the culm, we rejected a similar "ultimate consumer" argument in *Pennsylvania Electric*. 11 FMSHRC at 1881. We noted that under the Mine Act consumers of coal who otherwise meet the applicable definition of "mine" or "work of preparing the coal" are not provided any per se exclusion from the Act's jurisdiction. We held instead that the determination of Mine Act jurisdiction is governed by the two part analysis first set forth in *Elam* and followed in subsequent cases. 5/

Thus, we conclude that Westwood's activities fall within the Mine Act's definitions and therefore that the Secretary of Labor possesses statutory authority to make mine safety standards applicable to the disputed area. As in *Pennsylvania Electric*, however, we are unable to determine from the record presently before us whether the Secretary has, in fact, chosen to exercise her authority to regulate Westwood's operation under the Mine Act instead of the OSHA Act.

Both OSHA and MSHA have asserted jurisdiction at Westwood's facility. The extent of their respective assertions of authority and the rationale behind them, however, are far from clear. Before the judge, Westwood's counsel and Westwood's resident construction manager asserted that OSHA had begun inspecting Westwood's facility in August 1986.

Tr. 18-19, 104-05, 119. They stated that these inspections resulted in citations for violations of OSHA regulations. Tr. 18, 105. The construction manager further testified that each time OSHA conducted an inspection, it inspected the whole project and did not limit the

5/ In support of its argument for Commission recognition of a consumer exemption to Mine Act jurisdiction, Westwood refers us, as did Pennsylvania Electric, to cases decided under the Black Lung Benefits Act. 30 U.S.C. • 901 et seq. (1983). Westwood argues that in interpreting the phrase "work of preparing the coal" for Black Lung Benefits Act purposes, courts have generally held that the work of processing coal done by the end-purchaser in connection with its own consumption does not meet the statutory definition of coal preparation. We concluded in Pennsylvania Electric, however, that the cited Black Lung Benefits Act cases lack precedential value in resolving the type of Mine Act jurisdictional dispute before us. 11 FMSHRC at 1881-82 n.7. We noted the different purposes of the Black Lung Benefits Act and the Mine Act, and we emphasized that, unlike the Black Lung Benefits Act, the Mine Act has no statutory financial scheme logically requiring that coal preparation activities be closely tied to a coal producer. Hence, we conclude here, as we did in Pennsylvania Electric, that the Black Lung cases provide no basis from which to extrapolate the exemption from Mine Act coverage argued for by Westwood. Id.

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areas inspected except that OSHA never inspected the culm bank itself. Tr. 18, 19, 104-105, 121, 140. The construction manager further testified that since Westwood started removing materials from the culm bank, there had apparently been only one inspection by OSHA and that this inspection, in August 1988, involved the facility's ash silo. Tr. 120-21. Based on this testimony, the judge found that Westwood's "operation had been previously inspected by OSHA," but he did not delineate the precise scope of OSHA's inspections. 11 FMSHRC at 116.

The record further reflects that MSHA did not assert Mine Act jurisdiction at Westwood's facility until Inspector Uholic's arrival precipitated the events leading to this case. Uholic had been conducting an inspection at a neighboring mine and, while there, had been told that Westwood was extracting material from the culm bank. Uholic was asked when he was going to inspect Westwood's facility. Uholic then proceeded to Westwood's facility and requested permission to conduct an inspection under the Mine Act. Uholic told Westwood that since Westwood was taking material from the culm bank, he was "supposed to make an inspection." Tr. 33. Uholic did not specify the scope of his intended inspection. It was not until the issuance of the November 13, 1987, court order, which was consented to by Westwood, that specific areas for MSHA inspection were delineated. Tr. 82-83, 85-86, 104. The areas include the culm bank and

buildings and equipment, up to the point where the fuel enters the "boiler building." Tr. 20-21, 82.

Within these areas are facilities over which OSHA apparently also has asserted its authority, yet, nowhere in the record is there any indication that MSHA and OSHA mutually determined the extent of each agency's regulatory authority at the Westwood facility. The agencies have formally published an MSHA-OSHA Interagency Agreement (the "Agreement") setting forth a procedure for resolving general jurisdictional questions between the two agencies. The Agreement states in pertinent part:

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). The Agreement itself does not expressly address the question of MSHA-OSHA jurisdiction at facilities using the fluidized-bed combustion process for the burning of mine waste to generate electricity. This process is a relatively new technology that may be more common in the future and that may require special attention in terms of resolving potential overlapping areas of jurisdiction. See American Mining Congress Journal, October 1989, at 20

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(describing construction of a cogeneration plant powered by burning of coal mine refuse). Furthermore, no supplement to the Agreement has been published addressing this specialized process. Compare, Interagency Agreement; Revision Concerning Surface Retorting of Oil Shale, 48 Fed. Reg. 7521 (1983).

The record contains no indication that the procedures specified in the Agreement for the resolution of jurisdictional conflicts between MSHA and OSHA were followed or even consulted. See, 44 Fed. Reg. 22827 (1979). In fact, MSHA Inspectors Uholic and Rosini testified that they had never heard of the Agreement. Thus, the record does not reflect if their inspection of Westwood's facility reflects a reasoned resolution of the jurisdictional question by the Secretary and her agencies or simply resulted from an ad hoc unilateral assertion of jurisdiction by MSHA. Tr. 56, 83.

Without an interagency resolution of the question, the potential for possible conflicts between OSHA and MSHA in the exercise of their jurisdiction at Westwood's facility is great. Indeed, conflict has already

arisen in that both OSHA and MSHA have inspected Westwood's trucking operations at the facility. Tr. 105, Ex. G-14, 17, 18. OSHA has asserted jurisdiction over trucks and drivers removing ash from the ash silo, while MSHA has asserted jurisdiction over trucks and drivers hauling and dumping culm, even though the same trucks and drivers perform both operations over the same haulage roads and under the supervision of the same employer. Tr. 105-06, 121-23.

Moreover, the reasons for MSHA's decision to assert inspection authority in the disputed area are not well explained. At oral argument before us, counsel for the Secretary asserted that the inspection of Westwood's culm bank operations reflects MSHA's policy of inspecting those areas of a power plant that involve the preparation of coal and of leaving to OSHA the inspection of those areas involving the handling of already prepared coal. O.A. Tr. 17, 26. However, according to Rosini, a power plant engaged in coal crushing operations would not be subject to MSHA inspection nor would its use of front end loaders to load coal into a hopper warrant an inspection. Tr. 84.

Also, as we noted in *Pennsylvania Electric*, the Commission was advised (by a different Secretarial counsel in a prior case involving a coal handling power plant) that MSHA traditionally has not inspected power plants, that while MSHA has recognized part of the process utilized to produce electric power from coal requires handling and processing coal, it has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power generating process is more feasibly regulated by OSHA. 11 FMSHRC at 1884 (quoting *Utility Fuels, Inc.*, Docket No. CENT 85-59 (Sec. Motion to Dismiss (November 29, 1985))).

Furthermore, the jurisdictional question presented in this case is heightened by the fact that subsequent to the initiation of the litigation before us, the Secretary, through OSHA, proposed new, comprehensive safety standards applicable to the operation and maintenance of electrical power generation facilities. 54 Fed. Reg.

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4974-5024 (1989). Westwood's facility generates electricity and apparently is classified by the Federal Energy Regulatory Commission as a small power production facility. Tr. 95. The culm bank operation at the facility is integral to Westwood's production of electricity. Westwood's operation involves fuel handling and processing using equipment such as conveyors and crushers. Proposed OSHA standard 29 C.F.R. 1910.269(a)(1)(i) reads in part, "This section covers work practices, installations, and equipment associated with the operation and maintenance of electric power generation.... These provisions apply to...(A) Power generation, transmission, and distribution installations...and (B)...(1)...Fuel and ash handling and processing installations, such as coal conveyors and crushers." 54 Fed. Reg. at 5009.

Far from recognizing a division of jurisdiction between OSHA and MSHA, the proposed regulations appear to be all encompassing. As noted, section 1910.269 states that it is applicable to "fuel and ash handling and processing installations, such as coal conveyors and crushers." 29 C.F.R. §1910.269(a)(1)(i)(B)(1). In summarizing the proposed rules, the Assistant Secretary of Labor for Occupational Safety and Health explained that fuel handling operations within an electric power installation would be covered by the proposed regulations. 54 Fed. Reg. at 4980. The OSHA Assistant Secretary's view of the effect of the proposed regulations complements and coincides with the view of OSHA/MSHA jurisdiction propounded to the Commission in *Utility Fuels*, supra. Thus, the proposed rules suggest that the Secretary of Labor may still view electric generating operations such as Westwood's as subject to OSHA jurisdiction or, at least, that coverage by OSHA, rather than MSHA, may be more appropriate and effective. These conflicting indications of Secretarial intent raise serious questions as to which agency in the Department of Labor exercises safety and health authority over the facilities at power generating stations such as Westwood's. The answer is of great consequence to Westwood and its employees. It also is of importance to a growing number of similarly situated operators of facilities using the fluidized bed combustion process to burn coal mine waste for the production of energy. These companies, along with Westwood, must know which Department of Labor safety and health standards must be complied with and which statute prescribes the rights and duties to which they and their employees must conform their conduct. 6/ Section 113 of the Mine Act provides that "[i]f the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge." 30 U.S.C. • 823(d)(2)(C). Because of the pervasive

6/ The jurisdictional confusion generated in this case may not be restricted to coal and coal mine waste-fired powerplants. Other coal consuming entities may also be implicated in Mine Act coverage if they engage in "the work of preparing coal." At oral argument counsel for the Secretary indicated that steel plants and aluminum plants may fall into this category. O.A. Tr. pp. 22-23, 25-26.

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ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Westwood's power plant, and the importance of this question, we find it appropriate to order further proceedings. As we did in *Pennsylvania Electric*, we encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OSHA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf.

Accordingly, the judge's decision is vacated and the matter is

remanded to the judge for further proceedings consistent with this opinion including the taking of further evidence on the jurisdictional question presented and the entry of a new decision.

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Commissioner Doyle, dissenting:

Westwood Energy Properties (Westwood) is a small electric power generating plant that burns culm to generate electric power. It is located adjacent to a culm bank or refuse pile that was produced by Westwood Colliery, an unrelated entity, as a result of its mining operations between 1913 and 1947. Tr. 95. When the mine closed@ the coal preparation plant was demolished and the remains added to the culm bank which also contains rock, slate, shale, wood, metal, granite and quartz along with a small percentage of coal and other carbonaceous material. 11 FMSHRC 107. It is from that culm bank that Westwood produces electric power and sells it to an electric utility. Tr. 95, 96.

In October, 1987, the Mine Safety and Health Administration ("MSHA") for the first time attempted to inspect Westwood's culm bank, not as a result of a policy decision by the Secretary of Labor, nor of a decision reached between the MSHA District Manager and the OSHA District Manager pursuant to the MSHA-OSHA Interagency Agreement setting forth the procedure for resolving such jurisdictional questions, nor of a decision by the District Manager that such action was within MSHA's jurisdiction, but rather as a result of an individual inspector's decision to carry out the inspection after having been asked about it while he was inspecting a nearby mine.

The majority of the Commission concludes that "... Westwood literally engages in the 'work of preparing the coal' in that the processes undertaken by Westwood ... are among those specified in the statutory definition." Slip. op. at 7. After finding that Westwood does not prepare the culm to meet market specifications, as is usually done by a mine operator, the majority bases its decision on the fact that Westwood performs some of the enumerated processes in order to make the material suitable for consumption, as fuel, in its power plant. Slip. op. at 8.

They discount any exemption for the ultimate consumer of coal and conclude that the Secretary of Labor could properly exercise her authority to apply mine safety standards to Westwood's power generating facility. Because of what they term the "pervasive ambiguity" in the record as to whether the Secretary has, in fact, asserted Mine Act jurisdiction, they remand the matter to the administrative law judge for the taking of further evidence on the jurisdictional question and the entry of a new decision.

I disagree with the majority's conclusion that Westwood's culm bank is subject to the jurisdiction of the Mine Act, based on either of its

theories, i.e., that the culm bank "results from" the mining activity of an unrelated entity some forty years earlier, or that Westwood is engaged in "coal processing" because the culm passes over a one foot by one foot grizzly (to remove timbers and large rocks), passes over a magnet (to remove foreign objects such as spikes, mule shoes and nails) and is then loaded, stored and crushed before it is burned.

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I further believe that the case should be decided on the record before us, rather than being remanded for the taking of additional evidence.

Section 3(h), 30 U.S.C. 802(h), states:

(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;

(2) For purposes of titles II, III, and IV, "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.

The work of preparing coal" is defined in section 3(i), 30 U.S.C.

□820(i), as follows

[i] "work of preparing the coal" means 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.

A portion of the legislative history pertaining to these sections has been widely quoted in determining Mine Act coverage. That language states that the definition of a mine is to be given the broadest possible

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interpretation and that doubts should be resolved in favor of inclusion.

However, examination of that entire passage of the legislative history indicates a context in which Congress was contemplating regulation of mines in a more traditional sense. The complete passage reads as follows:

Thus, for example, the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of 'mine' are lands, excavations, shafts, slopes, and other property including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. 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 this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a

facility within the coverage of the Act." S.Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414. While that language is expansive, it is mine oriented, and it cannot be forgotten that the Act was intended to establish a "single mine safety and health law. applicable to all mining activity." S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). "The statute is aimed at an industry with an acknowledged history of serious accidents." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979). There is no indication of any intention to regulate other industries using coal, such as electric power generating plants (or even steel mills as only recently asserted by the Secretary). Or. Arg., Tr. 26. Indeed, the courts have recognized that it is "clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551 (D.C. Cir. 1984).

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I recognize that, in addition to considering Congress' concerns as set forth in the legislative history, deference is generally to be accorded interpretations by the agency charged with enforcing the law. Here, however, the record contains no evidence that, since the Mine Act became effective in 1978, the Secretary has made any previous attempts, either by the issuance of regulations or otherwise, to include electric power generating plants within the Act's coverage or to put the operators of such facilities on notice of liability under the Mine Act. Nor does the record indicate that the efforts first of a single inspector and subsequently of his district manager to bring Westwood's facility within its coverage actually represent the Secretary of Labor's interpretation of the Mine Act.

It should be noted that the Secretary's counsel argued that resolution of the jurisdictional issue rests solely on the language of the Mine Act itself, which he asserted mandates coverage, and does not involve deference to the Secretary's interpretation of the Mine Act. 1/ It is not surprising that the Secretary eschews deference to her interpretation of the Mine Act in this instance since the Secretary's policy with respect to whether electric power plants come within Mine Act coverage has been exhibited in a variety of ways as follows:

1. Her implied interpretation that coal handling at electric power generating facilities does not come within the Mine Act, based on her failure to assert such jurisdiction for almost ten years after passage of the Mine Act.
2. Her position, as set forth in an earlier Commission case, that: MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy,

MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency.

MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss, November 29, 1985).

1/ This position was advanced by the Secretary during oral argument before the Commission in a similar case, Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989), Or. Arg. Tr. 32.

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3. Her position that an electric power generating facility's handling of a product containing coal comes within coverage of the Mine Act, as asserted in this case.

4. Her position that coal handling at electric power generating facilities is governed by the OSHA² as set forth in regulations recently proposed by the Occupational Safety and Health Administration ("OSHA") for the operation and maintenance of electrical power generation facilities, which regulations include detailed provisions governing coal handling and processing at those facilities. 54 Fed. Reg. 4974-5024 (1989).

5. Her position that OSHA's proposed rules would apply only to electric generating facilities using already processed coal and that facilities using run-of-mine coal would be subject to Mine Act jurisdiction, as asserted by her counsel at oral argument before the Commission in Pennsylvania Electric Co., Or. Arg. Tr. 24, 29, 33. Because her interpretations have been neither longstanding nor consistent, any deference that would ordinarily be due to the Secretary in interpreting the Mine Act is not appropriate to this instance. See e.g., *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987); *American Mining Congress v. EPA*, 824 F.2d 1177, 1182 (D.C. Cir. 1987); *Sec. v. BethEnergy Mines*, 11 FMSHRC 1445, 1451 (August 1989); *Sec. v. Florence Mining Co.*, 5 FMSHRC

189, 196 (February 1983).

If literalism marked the beginning and end of our inquiry, I would have to concede that Westwood's facility falls within the Mine Act's coverage. Westwood's culm bank, having been created from the waste products of a mine that ceased operation more than four decades ago, does amount to property that "result[s] from" the work of extracting minerals from their natural deposit and, therefore, in a strictly literal sense,

falls within the language used to define a coal mine. Section 3(h), 30 U.S.C. 802(h). 2/ Similarly, although very little is done to the culm bank material before it is burned, it is undisputed that there is some loading, storing and crushing of the

2/ This type of literal translation could bring many diverse facilities, including airports, within the coverage of the Mine Act. As noted by the United States Court of Appeals for the District of Columbia Circuit, statutes "must be interpreted in light of the spirit in which they were written and the reasons for their enactment." *General Serv. Emp. U. Local No. 73 v. N.L.R.B.*, 578 F.2d 361, 366 (D.C. Cir. 1978). In the same vein, Judge Learned Hand observed that "the duty of ascertaining [the] meaning [of a statute] is difficult at best and one certain way of missing it is by reading it literally..." See *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963).

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culm, as is the case in most coal consumption. Those activities are, in fact, among the items enumerated in the definition of the "work of preparing coal" set forth in section 3(i), 30 U.S.C. 802(i).

The majority itself recognizes, however, that it is not sufficient to simply check off whether the activities listed in section 3(i) are being performed and the case of *MSHA v. Oliver M. Elam, Jr. Co.*, requires that there be an examination into the nature of the operation performing such activities. 4 FMSHRC 5, 7 (January 1982), Slip. op. at 7, 8. No such examination is made by the majority, however.

Rather, the majority proceeds to examine *Alexander Brothers, Inc.*, 4 FMSHRC 541 (April, 1982), a case that involved a refuse pile, but as part of a comprehensive coal processing operation in which material was removed from a refuse pile, loaded on trucks, transported to a screening plant, then screened and passed under a magnet. From there, the material was again screened and hand picked. It was then crushed, stockpiled and subsequently transported to a cleaning plant where it was washed, separated, dried, crushed, remixed and loaded into railroad cars for shipment to a broker. At issue in *Alexander Brothers* was not whether the operator was preparing coal within the definition set forth in the 1969 Coal Act, but whether coal preparation facilities, in the traditional sense (and not just the refuse pile), were subject to the Coal Act where they had no connection with any coal extractor. The Commission correctly found jurisdiction, citing the test set forth in *Elam* to the effect that the proper inquiry is not into whether the cited entity performs one or more of the listed functions but rather into the nature of the operation. 4 FMSHRC at 545. Accord *Donovan v. Island Terminals, Inc.*, 3 MSHC BNA 1983

(S.D. Ind. March 28, 1985). In the case at hand, however, the majority only compares the processes undertaken by *Westwood* with some of those

undertaken in Alexander Brothers and noting that, like Alexander Brothers, Westwood engages in crushing and sizing of material taken from the refuse pile, concludes that, because Westwood performs some of the specifically enumerated processes carried out by those who prepare coal and because this work is usually done by the operator of a coal mine, the operation comes within the ambit of section 3(i) of the Mine Act. At no point do they analyze and compare the nature of Westwood's operation (burning the culm as fuel for its generating plant) with that in Alexander Brothers (cleaning and processing material from a refuse pile for shipment, through a broker, into the chain of commerce). I believe that Westwood's operation is of an entirely different nature from the operation in Alexander Brothers and is not a "coal mine" in the sense contemplated by Congress when it enacted the Mine Act. Had Congress wanted to regulate not only mines but electric power generating plants, steel mills and other coal consumers, I think it would surely have given some indication of that intent.

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The majority also briefly addresses Westwood's position that ultimate consumers of coal are exempt from Mine Act coverage. rejecting it on the basis that there is no per se exclusion from the Mine's Act jurisdiction and@ thus, the inquiry need only address whether the activity in question can be found among those listed in section 3(i) and whether the work is usually performed by a coal mine operator. Slip. op. at 8. In Pennsylvania Electric Co., I noted that the Black Lung Benefits Act, 30 U.S.C. 901 et seq. (1982), also takes its definition of "coal mine" from section 3(h) of the Mine Act and I believe that the majority errs in dismissing those cases out of hand. The Black Lung Benefits Act cases have used the point where coal enters the stream of commerce or reached the ultimate consumer as the line of demarcation for determining whether an operation is a coal mine. 11 FMSHRC 1875 (October 1989), dissent at 1894. I am also of the view that the majority's opinion is in conflict with itself. As identified by the judge, the primary issue in the case is "whether Westwood's facility is a mine within the meaning of that term in the Mine Act, and therefore subject to the jurisdiction of MSHA." 11 FMSHRC at 107, Slip. op. at 4. After examining the Mine Act's definition of the term "coal or other mine" set forth in section 3(h), 30 U.S.C. §802(h), the majority concludes that "... the culm bank literally falls within the statutory definition of 'mine' since 'it result[s] from the work of extracting ... minerals from their natural deposits!..." Slip. op. at 6. The majority further concludes that Westwood "literally engages in the 'work of preparing coal'" and that it "engage[s] in the enumerated processes, ... for the purpose of making the mined material suitable for a particular use; ... as a fuel to be consumed at an electric generating facility." Slip op. at 7, 8. Thus, they "conclude that Westwood's activities fall within the Mine Act's definitions and therefore that the Secretary of Labor possesses statutory authority to make mine safety

standards applicable to the disputed area ." Slip. op. at 8. They remand the case for a determination of whether the Secretary has chosen to exercise that authority. Slip op. at 8.

If, in fact, the majority is correct in its conclusion that Westwood's operation falls clearly within the statutory definition of a mine, any determination other than that the Mine Act applies to Westwood's operation is in my opinion, precluded. Section 4 of the Mine Act provides that [E]ach coal ... mine ... shall be subject to the provisions of this Act."

"If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,843 N. 9 (1984). Thus, coverage would be mandated, not discretionary with the Secretary.

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For the reasons set forth above, I would reverse the judge and dismiss the case against Westwood.

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