CCASE:
MSHA V. INLAND STEEL COAL
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 15, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. VINC 77-164
v. IBMA No. 77-66

INLAND STEEL COAL COMPANY

DECISION

This proceeding arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976)(amended 1977). 1/ The central issue is whether 30 C.F.R. $ 75.1712-1 requires bathing facilities to be provided for construction employees who perform work on the surface of an underground coal mine. The administrative law judge concluded that the standard did not require bathing facilities for such workers, and, for the reasons that follow, we reverse.

In 1977 Inland Steel Coal Company was developing a new underground coal mine in Illinois, and employed several contractors for the work. A major component of the mining complex was a coal preparation plant being constructed on the surface of the mine by the Roberts and Schaefer Company, one of Inland's chief contractors. Roberts and Schaefer provided its employees with changing facilities, but not a bathhouse. A different contractor was building bathing facilities for the miners Inland would employ when the mining complex was opened. This building was scheduled for completion in May 1978, although Inland did not plan to make the bathing facilities available to the employees of the various construction contractors. 2/

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1/ The appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before us for decision. 30 U.S.C. $ 961 (Supp. IV 1980). (The Mine Safety and Health Administration has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA)). This proceeding originally arose on review of an unabated notice of violation issued under section 104(b) of the 1969 Coal Act. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835, 835-36 (May 1982), we will review the merits of the notice at this time.

2/ Among the other contractors involved in the development of the mine was the Zeni, McKinney and Williams Corporation, which was sinking the shaft. Zeni provided its employees with a temporary bathhouse. In
(Footnote continued)
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In August 1977, a MESA inspector ascertained that there was no bathhouse for the Roberts and Schaefer employees and that a number of those employees wanted bathing facilities. Subsequently, MESA issued a section 104(b) notice of violation to Inland for failure to comply with 30 C.F.R. $ 75.1712-1. Section 75.1712-1 provides:
Availability of surface bathing facilities; change rooms; and sanitary facilities.
Except where a waiver has been granted ..., each operator of an underground coal mine shall ... provide bathing facilities, clothing change rooms, and sanitary facilities, as hereinafter prescribed, for the use of the miners at the mine. [3/]
Section 75.1712-1 in turn implements 30 C.F.R. $ 75.1712, which states:
The Secretary may require any operator to provide adequate facilities for the miners to change from the clothes worn underground, to provide for the storing of such clothes from shift to shift, and to provide sanitary and bathing facilities. Sanitary toilet facilities shall be provided in the active workings of the mine when such surface facilities are not readily accessible to the active workings.
Section 75.1712 mirrors section 317(1) of the 1969 Coal Act and was carried over intact as section 317(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. IV 1980). Section 75.1712-1 permits operators to seek waivers from the standard's requirements, and after receiving the notice of violation, Inland applied to the MESA District Director of District Eight for a

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fn. 2/ continued
support of a contention that it was not an industry practice to provide bathhouses for surface construction workers, Inland argues that Zeni's provision of a bathhouse to its shaft sinking employees and Roberts and Schaefer's provision only of changing facilities to its construction employees were consistent with the collective bargaining agreement that both contractors had with the United Mine Workers. We need not attempt to resolve this question of contractual interpretation since this case does not require it. This case concerns only the language of regulatory standards and, in addition, the Zeni employees are not involved in the present litigation. See generally Loc. Union No. 781, etc. v. Eastern Assoc. Coal Corp., 3

FMSHRC 1175, 1179 (May 1981).

3/ The original notice, which was issued on August 23, 1977, alleged a violation of 30 C.F.R. $ 71.400. Section 71.400 notes that "[s]anitary facilities at surface work areas of underground coal mines are subject to the provisions of [30 C.F.R.] $ 75.1712 ... et seq." Relying on this language, MESA modified the notice of violation on September 30, 1977, to allege a violation of section 75.1712-1 on the grounds that the construction work in question was being performed on the surface of an underground coal mine.

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waiver from the bathhouse requirements. 4/ District Eight denied the waiver in accordance with its policy of denying waivers unless a survey of the miners indicated they would not use a bathhouse. 5/ Inland also applied for review of the notice of violation. 6/ In his decision, the administrative law judge vacated the notice of violation, concluding that section 75.1712-1 required bathing facilities only for miners working underground. We disagree.

This case turns on the meaning of section 75.1712-l's provision that the various facilities to be supplied are "for the use of the miners at the mine" (emphasis added). The underscored language raises two questions: whether the Roberts and Schaefer construction workers were "miners" within the meaning of the 1969 Coal Act and, if so, whether the provisions regarding bathing facilities applied to them.

With respect to the first question, we agree with the judge that there is "no doubt that the broad definition of miners in the Act includes construction workers such as those employed by Roberts and Schaefer in this case." Dec. at 9. Section 3(g) of the Coal Act, 30 U.S.C. $ 802(g)(1976)(amended 1977), defined a miner as "any individual working in a coal mine." Section 3(h) of the Coal Act, 30 U.S.C. $ 302(h) (1976)(amended 1977), defined a coal mine as:

4/ Section 75.1712-4 sets forth relevant procedures for such waiver applications:

> The Coal Mine Safety District Manager for the district in which the mine is located may, upon written application by the operator, waive any or all of the requirements of $$ 75.1712-1 through 75.1712-3 if he determines that the operator of the mine cannot or need not meet any part or all of such requirements, and, upon issuance of such waiver, he shall set forth the facilities which will not be required and the specific reason or reasons for such waiver.

In applying for the waiver, Inland did not concede the applicability of section 75.1712-1 to the Roberts and Schaefer construction employees.

5/ On appeal, Inland does not argue that a waiver should have been

granted. Accordingly, although we might question the wisdom of the waiver denial, that issue is not before us. We note that District Eight's use of surveys on waived applications was solely its own policy, and was not advocated or suggested by MESA headquarters.

6/ Pending disposition of Inland's applications for waiver and review, MESA extended the time for abatement of the noticed violation. As of the issuance of the judge's decision vacating the notice, the alleged violation remained unabated.

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an area of land and all structures, facilities ... placed upon, under, or above the surface of such land by any person, used in, or to be used in ... the work of extracting ... coal ... from its natural deposits in the earth ... and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(Emphasis added.) The surface coal preparation plant being constructed here was "to be used ... in the work of ... preparing coal," and thus would clearly qualify as part of a coal mine. Therefore, the construction workers in this case were miners. See Bituminous Coal Operator's Ass'n, Inc. v. Secretary of Interior, 547 F.2d 240, 244-25 (4th Cir. 1977).

Despite his conclusion that the construction workers were miners within the meaning of the 1969 Coal Act, the judge reasoned that not every standard necessarily applies to all miners and determined that the bathing facility requirements of section 75.1712-1 covered only miners working underground. Based on the standard's broad language and derivation, we conclude that the bathing facility provisions extended to the surface construction workers in this case.

The plain language of the regulation expressly states that bathing facilities shall be provided for "miners at the mine." The regulation does not limit its coverage only to underground miners, but rather expressly requires bathing facilities for "miners." We cannot discern from the face of the standard an intent to exclude miners such as the surface construction workers involved here from the broad sweep of the standard's coverage. Although the judge focused on the fact that the standard is contained in safety regulations for underground coal mines, the location of the standard is explicable and is not legally significant in this case. Indeed, the relevant history of the standard reinforces our conclusion as to its broad meaning.

To understand the scope of section 75.1712-1, it is necessary to examine a related standard in Part 71. A bathing facility requirement for surface miners of underground coal mines was originally contained in 30 C.F.R. $ 71.400, the standard under which MESA first cited Inland. The proposed rules for Part 71 were entitled "Mandatory Health Standards--Surface Work Areas of Underground Coal Mines and

Surface Coal Mines." Subpart E of the proposed rules was entitled "Surface Bathing Facilities, Change Rooms, and Sanitary Toilet Facilities." In its original proposed form, section 71.400 provided:

> On and after June 30, 1971, each operator of an underground coal mine and each operator of a surface coal mine shall provide bathing facilities, clothing change rooms and adjacent sanitary facilities as hereinafter prescribed, for the use of miners employed in surface installations and at surface work sites of such mines.

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36 Fed. Reg. 254 (1971)(emphasis added). This language and the relevant titles indicate that bathing facilities were contemplated for the surface work areas of both underground and surface mines. After public hearings on the proposed regulations, the Secretary deleted the reference in section 71.400 to underground coal mines. He specifically found:

> With respect to surface bathing facilities, change rooms, and sanitary flush toilet facilities, that:
> Operators of underground coal mines are presently required by 30 C.F.R. Part 75 to provide surface bathing facilities, change rooms, and sanitary flush toilet facilities for the use of miners.

36 Fed. Reg. 20127 (1971). As already noted, section 71.400 as finally promulgated applies only to miners at surface mines and states that "[s]anitary facilities at surface work areas of underground coal mines" are subject to 30 C.F.R. $ 75.1712 et seq. 7/ In short, what the Secretary left out of section 71.400 is precisely what he found was already covered by section 75.1712--namely a requirement for provision of sanitary facilities for the use of miners employed in surface installations and at surface work areas of underground coal mines. Thus, section 75.1712-1 was intended to apply to surface miners, as well as underground miners, at underground coal mines. Since the construction employees in this case were employed at a surface installation and surface work area of an underground mine, we conclude that the regulation applied to them.

For the foregoing reasons, the judge's decision is reversed and the notice of violation is reinstated.

A. E. Lawson,
Commissioner

7/ The judge expressed his view that the note in section 71.400 that "sanitary facilities" at surface work areas were subject to section 75.1712 et seq. referred only to sanitary toilet facilities. In light of the history of section 71.400 set forth above, we conclude that the term was used broadly in this instance to cover various types of

sanitary facilities, including those for bathing.
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