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SOL (MSHA) v. ALEXANDER BROTHERS,
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. HOPE 79-221-P A/O No. 46-05643-03001
v.	
ALEXANDER BROTHERS, INC., RESPONDENT	Whitco No. 1 Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner
Donald D. Saxton, Esq., Washington, Pennsylvania, for Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (hereinafter the Act), (FOOTNOTE.1) to assess civil penalties against Alexander Brothers, Inc. At

the hearing held on January 8, 1981, in Charleston, West Virginia, the parties agreed that the hearing would be limited to one contested issue--whether Respondent was subject to the Act.

After completing the presentation of their cases as to the jurisdictional issue, the parties proposed a settlement of the remaining issues. The citations in this case and the settlement are as follows:

Number	Date	30 C.F.R. Standard	Assessment	Disposition Settlement
7-0012	11/15/77	77.1707	$ 30	$ 30
7-0014	11/15/77	77.1103(d)	18	18
7-0015	11/15/77	77.505	20	20
7-0016	11/15/77	77.505	20	20
7-0017	11/15/77	77.904	24	24
7-0018	11/15/77	77.505	18	18
7-0019	11/15/77	77.504	26	26
7-0020	11/15/77	77.506	24	24
7-0021	11/15/77	77.506	16	16
7-0022	11/15/77	77.505	20	20
7-0023	11/15/77	77.508	28	28
		Total	$244	$244

In support of its motion to approve the settlement, Petitioner asserted, in substance, as follows:

> The assessment before me has no prior history of payments, so we have no prior history to show. We will so stipulate.
> We will stipulate that anything in the record that is relevant to any of the criteria will, of course, be considered by Your Honor, in determining and approving the settlement.

We would agree that the operator is a small operator. The inspectors have testified that he always demonstrated good faith in abating alleged violations and so, we would agree that you can find "good faith" for each of them.

We agreed, at the beginning of the hearing, that he would be able to pay the sum of two hundred and forty-four dollars ($244.00) without adverse effect on his ability to remain in business. So, that leaves us with negligence and gravity.

Referring to the first one, Government's Exhibit No. 1 (Notice No. 6 RRW, Nov. 15, 1977), we feel taken into consideration would be the fact that the operator either didn't know before or didn't believe that he was under the Act and therefore, had not familiarized himself with such things as what first-aid equipment he needed on there as required by the regulations. Upon being informed, of course, he promptly got it, so we would say that there is just ordinary negligence there.

As to gravity, of course, once the equipment is needed, it is very serious if it is not present. However, Mr. Alexander has testified that his home was nearby and we assume that he could get much of the equipment there, if he needed it in a hurry.

The proposed assessment of that alleged violation is thirty dollars ($30.00) which is the largest one for any of the eleven that are in issue and it's the opinion of the Solicitor, that considering the unique facts involved in this case -- considering it did occur back in 1977 and inflation has changed matters somewhat -- all of these, I might say were issued on November 15, 1977, so they are all old. And therefore, we believe that it is in the best interest of the public that the settlement be approved.

Again, we have covered everything as to all of these except negligence and gravity. This one (Notice No. 1 GLS, Nov. 15, 1977) involves a citation alleging that the area around the transformer was not kept free from grass and dry weeds. There would be a danger of possible fire as a result of this. Of course, the transformer must malfunction before that would occur. And we feel that, although there is a certain risk or hazard to the miners, that it is not too great, because nobody ordinarily works close to the transformer.

As to negligence, we would suggest an ordinary degree of negligence. The proposed assessment for that is eighteen dollars ($18.00), which ordinarily would be quite

small and unacceptable but in view of the confusion as to whether this is or is not under the Act, we feel that we are justified in proposing such a settlement.

We have four 77.505 alleged violations. The first one, Government Exhibit No. 5 (Notice No. 2 GLS, Nov. 15, 1977), is that the power cables entering the fuse box did not have the required fittings. The insulation around the power cable was adequate, so the danger there would be that possible vibration could impair the insulation. We would say that there is a potential hazard, but no present hazard until the cable was penetrated. For that one, the proposed penalty is twenty dollars ($20.00) and we consider that to be reasonable.

The next one, which is Government's Exhibit No. 7 (Notice No. 3 GLS, Nov. 15, 1977), is another 77.505, because the cable entering the breaker compartment did not have the proper fitting. My statement would be the same to that, with a proposed penalty of twenty dollars ($20.00).

The next proposed one is Government No. 9 (Notice No. 4 GLS, Nov. 15, 1977), which concerns a 77.904 violation that the circuit breaker located in the tipple did not show what circuits they controlled. For that one, there was a proposed penalty of twenty-four dollars ($24.00). The circuit breaker should be labeled and so, we consider that there is a hazard to the miners by not having it so. The circuit breaker, of course, is back-up protection and that would lessen the gravity to some extent.

We still consider that to be serious and consider it to be ordinary negligence, in view of the fact that the operator was unaware that he was under the provisions of the Act.

The next one, Government's Exhibit No. 11 (Notice No. 5 GLS, Nov. 15, 1977), is 30 CFR 77.505. Because the power cable on a transformer did not have the proper fittings, my statement would be the same and the proposed assessment for this one is eighteen dollars ($18.00) instead of the twenty (20) as it was previously, but we feel it is reasonable, in view of the facts.

The next one is Government's Exhibit No. 13 (Notice No. 6 GLS, Nov. 15, 1977). It is a 30 CFR 77.504 violation and the proposed penalty is twenty-six dollars ($26.00). It is for a splice which was not adequately insulated.

Of course, whether a splice is insulated or not or adequately insulated and calls for a judgment call,

however, Mr. Smith is an electrical inspector, and I think, he has

> sufficient experience that he would spot it, so we do consider there was a hazard there, and so it is serious and is a result of ordinary negligence.
>
> The next one, Government's Proposed Exhibit No. 15 (Notice No. 7 GLS, Nov. 15, 1977), is an alleged violation of 30 CFR 77.506, because the circuit protection was not provided with number eight cable, supplying power to a water pump. There is a proposed penalty of twenty-four dollars ($24.00) for that. We consider that, in order for there to be a hazard there, there must be a malfunction but we do consider it serious and the result of ordinary negligence.
>
> Considering the next one, Government's Exhibit No. 17 (Notice No. 8 GLS, Nov. 15, 1977), the proposed penalty is sixteen dollars ($16.00) and it is an alleged violation of 30 CFR 77.506, because short circuit overload protection was not provided for a cable supplying power to a pump. What we said on the previous one would be true on this one, also, except that, again, here you'd have to have a malfunction before you would have a hazard, and so, we consider sixteen dollars ($16.00) is acceptable and in view of the reasons we have stated, although it is very low.
>
> The next one, Government's Exhibit No. 19 (Notice No. 9 GLS, Nov. 15, 1977) is a violation of 30 CFR 77.505, because of a power cable entering the compartment of a dryer was not with the proper fitting. What we've said previously would be true with that. We have proposed the same penalty of twenty dollars ($20.00).
>
> The final one, Government's Exhibit No. 21 (Notice No. 10 GLS, Nov. 15, 1977) is a 77.508, because lightning arresters were not provided for the exposed power conductors and there is a proposed penalty of twenty-eight dollars ($28.00) for that alleged violation. We consider that it is serious since it was high and it is a result of ordinary negligence.

At the conclusion of the hearing, the settlement agreement was approved, contingent on resolution of the jurisdictional issue. In its effort to establish that Respondent's operation was a "coal mine" within the meaning of the Act, MSHA called four witnesses: Raymond Webb, former MSHA inspector now employed by W and C Coal Company; Conrad Spangler, MSHA subdistrict manager; John McGann, MSHA inspector; and Frank Alexander, president, Alexander Brothers, Inc. Frank Alexander was called as a witness by Respondent.

Jurisdiction

The refuse pile from which Respondent took its raw material was comprised of the waste material which the Pond Creek Coal Company (later part

of the Island Creek Coal Company) disposed of in the course of mining at its Bartley No. 1 Underground Coal Mine from the 1930's until 1967. The Bartley No. 1 Mine had been sealed prior to the initiation of Respondent's operation.

After the cessation of operations at the Bartley No. 1 Mine, the property on which the refuse pile was located was leased from its owner, Mr. Henry Warden, by the Whitco and Recco Coal Corporation (Recco). Recco engaged in the reclamation of coal from the refuse pile, but did not do so profitably. Respondent purchased Recco's equipment (FOOTNOTE.2) and acquired rights to the lease in late 1972 or early 1973.

The refuse pile from which Respondent took its raw material covered a large area on the side of a mountain. It consisted of coarse and fine coal, rock dust, garbage, rock, timbers, wood, steel, dirt, tin cans, bottles, metal, and general debris.

Respondent's operation was divided into two "phases."(FOOTNOTE.3) In the first phase, waste material was taken from the refuse pile, loaded into trucks and transported to the site at which the initial, rough screening processes were carried out. At the site, the material was dumped into a bin and then subjected to a number of separation and sizing processes. The phase 1 processes included the following operations: The waste material was separated by size and the larger size material was passed through a hammer mill. A magnet was used to remove scrap metal and "pickers" removed rock and other obvious waste from the material. When enough material had been accumulated for further processing, the end product of the phase 1 processing was loaded into trucks and hauled to the cleaning plant where phase 2 processing was carried out.

At the cleaning plant, the material was loaded into a bin; it was then fed from the bin by a belt conveyor into a tank where it was fixed with water. After the material passed into a "jig" where non-coal was removed. The larger pieces were again separated out, passed through a crusher and broken down to 1 inch in size. The crushed coarse was again screened to remove larger pieces. These larger pieces were passed to Respondent's heavy media washer for further ash-control treatment. The fine material was separated into coal and non-coal by a cyclone-washing process. The cleaned coarse and fine coal was remixed and loaded into railroad cars for shipment.

The percentage of coal to waste in the material taken by Respondent from the refuse pile varied. At the time of the hearing, Frank Alexander estimated

that the percentage of coal was 20 to 25 percent. In traditional preparation facilities, the raw material processed is run-of-mine and, therefore, contains a much higher percentage of coal than did the refuse processed in the Alexande Brothers' operation. As a consequence, traditional facilities do not resort to some of the techniques employed by Alexander Brothers for separation of coal and waste, however, in both types of operation, the preparation process involved "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. Despite the differences in the volume of production, the composition of the raw material, and the percentage of coal in the raw material fed to the plants, preparation facilities associated with ordinary large mines do substantially what Respondent did. Such preparation plants operated by the owner of the mine have consistently been inspected by MSHA and its predecessors, the Bureau of Mines and the Mining Enforcement and Safety Administration (hereinafter collectively referred to as MSHA).

Section 4 of the Act designates those mines subject thereto as follows: "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

The parties stipulated that the products of Respondent's operation entered commerce. The determinative issue, therefore, is whether Respondent's operation might be categorized as a "coal mine" within the meaning of the Act, thereby subjecting Respondent to the coverage of the Act.

The term "coal mine" was defined in section 3(h) as follows:

> "[C]oal 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. [Emphasis added.]

At the outset, it is to be noted that the Act was a remedial and safety statute, the primary purpose of which was to protect the health and safety of the Nation's coal miners.(FOOTNOTE.4) It is proper to construe the Act liberally so as to most fully effectuate the purposes enunciated by Congress.(FOOTNOTE.5)

With this premise in mind, three of the phrases of section 3(h) must be examined to determine whether Respondent's operation was a "coal mine" within the meaning of the Act. The argument could be made that jurisdiction exists because (1) the land and property which was the basis of Respondent's operation resulted from earlier coal mining and retained the status of a coal mine, (2) that Respondent performed "the work of preparing the coal so extracted," or (3) that Respondent operated a "custom coal preparation facility."

The refuse pile from which Respondent obtained its raw material was an area of land or property "resulting from" the work of extracting coal from its natural deposit in the earth. It remained a coal mine within the meaning of the Act despite its having been abandoned by the original operator, Pond Creek Coal Company. An operator remains responsible for such abandoned refuse piles and must comply with the requirements of the Act, including the extinguishing of fires in the pile. Kessler Coals, Inc. v. Mining Enforcement and Safety Administration and United Mine Workers of America, Docket No. HOPE 76-235 (March 18, 1975). In that case the site had been abandoned as a depository for the by-products from mining; Kessler Coals, Inc. did not dispose of debris from its preparation plant on the refuse pile which had been created by the predecessor, Glogora Coal Company.

Thus, at least some of the property on which Alexander Brothers operated retained the status of a "coal mine" under the Act. While Respondent's operation might be held subject to the Act on this a basis alone, it has been clearly enunciated in cases, which will be discussed later, by a U.S. Court of Appeals and a U.S. District Court that such operations are subject to the Act on a different theory. Respondent's operation was a "coal mine", subject to the Act, because Respondent engaged in the work of preparing coal. In construing the phrase "and the work of preparing the coal so extracted," the pivotal question herein is whether coverage of the 1969 Act may extend to a person(FOOTNOTE.6) engaged in the preparation of coal which was previously extracted from its natural deposit in the earth by a different person.

While recourse to legislative history of the Act is unhelpful for the most part,(FOOTNOTE.7) the intent of Congress with respect to section 3(h) can be

gleaned from a reading of the language of the section in light of the purposes of the Act. On the surface, the language of section 3(h) is broad enough to encompass persons who engage in the work of preparing coal previously extracted from its natural deposit by another person. Furthermore, nowhere in the Act is there any indication that Congress intended to exclude such persons from the coverage of the Act.

Respondent clearly engaged in the "work of preparing the coal" as defined in the Act. Donovan v. Tacoma Fuel Company, Civil Action No. 77-0104D (D.W. Va., June 29, 1981).(FOOTNOTE.8) The "work of preparing the coal" is defined in section 3(i) as follows: ""[W]ork 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." Each of these processes was carried out in some fashion in Respondent's operation. The concluding phrase of section 3(i) does not restrict "the work of preparing the coal" to processing undertaken by the person who extracted the coal from its natural deposit in the earth. This broad, descriptive phrase is a clear expression of congressional intent that the processes specifically listed in the definition are not exclusive. In so finding, Respondent's argument that section 3(i) restricts the scope of "the work of preparing the coal" to persons who extract coal from its natural deposit is expressly rejected.

There is no basis for Respondent's argument that it processed refuse rather than coal. Respondent's raw material was comprised of up to 25 percent coal. The fact that run-of-mine is of a much higher percentage of coal

is of no consequence. The purpose of Respondent's operation was the separation of the marketable coal from previously deposited waste. The useless waste material was then discarded. Only in the most roundabout sense could it be said that it was the refuse rather than coal that was prepared. It was clearly coal that was prepared throughout Respondent's operation.

A memorandum from the Assistant Solicitor of MSHA's predecessor dated March 31, 1972 (the Geisler Memorandum), improperly interpreted the Act by expressing the opinion that the Geisler Coal Company which prepared coal purchased from other operators was not subject to the Act. This interpretation was subsequently corrected when in October, 1976, the Assistant Solicitor issued a memorandum (hereinafter, the 1976 memorandum) expressly rescinding that conclusion of the Geisler Memorandum. In the 1976 memorandum, the Assistant Solicitor stated that he was of the opinion that the person who performs the "work of preparing the coal so extracted" need not be the same person who "extracts the coal from its natural deposits in the earth." Although such policy memoranda by MSHA and its predecessor are not binding on this Commission or the courts, a U.S. District Court, in Tacoma, further discussed below, approved the view of the Assistant Solicitor expressed in the 1976 memorandum.(FOOTNOTE.9)

It has recently been held that operations similar to those of Respondent are subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the 1977 Act). In pertinent part, a coal mine is defined in that Act to be "an area of land * * * or other property * * * used in, or to be used in, or resulting from, * * * the work of preparing coal."(FOOTNOTE.10) As noted above in footnote8, the section

3(i) definition of "the work of preparing the coal" is the same under both the 1969 Act and the 1977 Act. Two relevant cases have upheld the authority of MSHA to inspect coal preparation facilities even though the person processing the coal is not the same person who extracted the coal from its natural deposit sometime in the past. In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (hereinafter, Stoudt's Ferry), it was held that the word "mine"(FOOTNOTE.1)1 as used in the 1977 Act included the Stoudt Ferry Preparation Company's preparation plant which separated a low-grade fuel from sand and gravel dredged from a riverbed. The court found that "the work of preparing coal * * * is included within the 1977 Act whether or not extraction is also being performed by the operator." Id. at 592.

In Tacoma, the court found that "the work of preparing coal is, by itself, sufficient to place Tacoma Fuel Company's operation within the section 3(h) definition of a "coal mine'." Tacoma Fuel Company neither owned nor operated mines. The company purchased coal from various miners of coal f.o.b. its plant. It then mixed and crushed the coal and sold it to various customers. The jurisdiction asserted by MSHA in following its 1976 memorandum was expressly upheld.

With regard to the relevant facts upon which the finding of jurisdiction rests, the instant case cannot be distinguished from Stoudt's Ferry and Tacoma. Respondent's operation constitutes the work of preparing coal and, as such, would be subject to the provisions of the 1977 Act even though Respondent does not extract coal from its natural deposit in the earth.

~2096

There is no difference material herein between the language used in the 1969 Act relating to coal preparation and that used in the 1977 Act.(FOOTNOTE.12) The definition in the 1969 Act includes "the work of extracting * * * coal * * * from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted." The definition in the 1977 Act includes "the work of extracting (coal) from (its) natural deposits * * * or the work of preparing coal."(FOOTNOTE.13) The breadth of the language in the 1969 Act indicates that such language was intended to be descriptive rather than limiting. In drafting and adopting section 3(h) of the 1969 Act, Congress left no doubt that the Act was to apply to the entire coal mining industry. There is nothing in section 3(h) which would permit the exclusion of Respondent from the coverage of the Act. That is, there is no language therein which would permit the categorical exclusion of a person who does not extract the coal from its natural deposit but performs the work of preparing coal; nor is there language which would categorically exclude a person performing the work of preparing coal unless such preparation was performed contemporaneously with the extraction of the coal from its natural deposits.

In its brief, Petitioner asserted that Respondent's operation constituted a "custom coal preparation facility" within the meaning of the Act and argued that the pertinent language of section 3(h) was properly interpreted by MSHA in its 1976 memorandum in which the Assistant Solicitor stated:

> We are of the view that Congress did not intend the word "custom" to be used in a restrictive sense but in a broad sense. Thus, a coal preparation plant operator who pursues a common course of action or practice of preparing coal to meet the customary requirements of the electric utility market or the coal coking market, directly or indirectly, without a "personal order or specifcation" but which meets the customary requirements or specifications of the purchasers and users of the coal, also falls within the term "custom coal preparation plant." [Emphasis added.]

In section 3(h), "custom" is used as an adjective modifying the phrase "custom coal preparation facilities." It is accepted that Congress intended "custom" to be interpreted in a broad sense but the interpretation urged by MSHA is at odds with the traditional definition of the word. There is no need herein to resolve the meaning of "custom" or to determine the scope of the phrase "custom coal preparation facilities" given the alternate basis for jurisdiction enunciated above.

Respondent also argued that section 3(h) of the 1969 Act was void for vagueness because it was not "definite and certain enough to enable every person, by reading the law, to know what his rights and obligations are and how the law will operate when put into execution * * * and it did not "provide clearly ascertainable and well defined standards to guide the ministerial officers charged by law with its implementation and administration" (citing Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971)).

The due process clause of the Fifth Admendment to the United States Consitution requires that a statute be of a reasonable degree of certainty and definiteness. A statute which is non-criminal and does not impinge upon a fundamental right is unconstitutionally vague only if it is written so that "men of common intelligence must necessarily guess at its meaning." See 16A Am. Jur. 2d Consitutional Law 818 n. 20. Section 3(h) passes constitutional muster under this standard. Respondent's perplexity is undoubtedly due to the broadness of the Act; not its vagueness. It is clear that Respondent's operation is subject to the Act.

Respondent also argued that the notices and orders at issue herein are "void and of no effect and should be rescinded" because MSHA violated its internal procedures by failing to give Alexander notice and a warning that it had reconsidered its position and changed its opinion with respect to inspecting Respondent's operation. The internal procedures to which Respondent referred were instructions contained a memorandum dated

December 1, 1976, from Petitioner's Assistant Solicitor-Regulations and Procedures-to MSHA District Manager's requiring notification be given to operators prior to the first inspection conducted pursuant to the 1976 memorandum. Respondent admitted in its final posthearing brief that it had received such notice on October 12, 1977. At that time, a notice of violation was issued to Respondent. No opinion is expressed as to the validity of the notice of violation issued on October 12, 1977. The notices of violation at issue herein were dated November 15, 1977, more than a month after MSHA's first exercise of jurisdiction. At least with regard to the notices at issue herein, MSHA complied with the internal procedures required of its personnel in the memorandum dated December 1, 1976.

Proposed findings of fact and conclusions of law in the briefs filed by the parties which are immaterial to the issues presented or inconsistent with this decision are rejected.

ORDER

The approved settlement negotiated by the parties in the above-captioned proceeding is AFFIRMED.

Respondent is ORDERED to pay the amount of $244 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

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~FOOTNOTE_ONE

Section 109(a) of the Act reads in pertinent part as follows:

"(a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

* * * * * * *

"(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact

therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of title 5 of the United States Code."

* * * * * * *

Section 105, section 110(i) and the transfer provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. II 1978), conferred jurisdiction over these proceedings to the Federal Mine Safety and Health Review Commission.

~FOOTNOTE_TWO
Respondent never used the Recco equipment in its operation.

~FOOTNOTE_THREE
At the hearing, Frank Alexander referred to a third phase--a cyclone separator. The use of the cylone separation process was included by Mr. Alexander in his description of phase 2 of his operation. Subesequent testimony established that cylone separators were also considered to be part of phase 3. Respondent's description of its operation in its posthearing brief includes reference to the use of a cyclone in phase 2.

~FOOTNOTE_FOUR
See section 2(a) of the Act, 30 U.S.C. 801.

~FOOTNOTE_FIVE
See Magma Copper Company v. Secretary of Labor, citing Whirlpool Corporation v. Marshall, 445 U.S. 1, 13, 100 S. Ct. 883, 891, 63 L.Ed.2d 154 (1980).

~FOOTNOTE_SIX
Section 3(f) of the Act provides that ""person' means any individual, partnership, association, firm, subsidiary of a corporation, or other organization."

~FOOTNOTE_SEVEN
The legislative history does not contain an express explanation of the congressional intent in enacting sections 3(h) or 3(i).

In its report on the 1977 Act, the Senate Committee on Human Resources stated the following regarding the amendment to section 3(h):

"(The 1977 Act) enlarges the definition of "mine" in section 3(h) to include those mines previously covered by the Federal Metal and Non-Metallic, Mine Safety Act. This definition is also expended [sic] to include facilities for the preparation of coal, except that the Secretary is to give due consideration to the convenience of giving one Assistant Secretary all authority with respect to health and safety of miners employed at

one physical establishment." Report of the Senate Committee on Human Resources No. 95-181, May 16, 1977, p. 59.

Respondent's argument that this passage was an expression by Congress of its understanding that the 1969 Act did not extend to facilities for the preparation of coal where such facilities were not located "at the site of a coal mine" is without foundation. The passage addresses the expansion of MSHA's jurisdiction over coal preparation facilities under the 1977 Act but was not intended to convey and does not convey any clue to congressional understanding of the scope of the jurisdiction conveyed to MSHA by the 1969 Act. Rather, the passage addresses the vehicle for intra-agency resolution of the problems presented by partially coextensive statutes.

~FOOTNOTE_EIGHT

The court in Tacoma found that the crushing and mixing operation carried out by Tacoma Fuel Company was the "work of preparing the coal" as defined in section 3(h) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., despite the fact that Tacoma Fuel Company did not engage in the extraction of coal from the ground but merely purchased coal from various miners of coal f.o.b. its plant. The definition of the "work of preparing the coal" contained in the 1977 Act is identical to that contained in the 1969 Act.

~FOOTNOTE_NINE

Petitioner acknowledged that such policy memoranda did not have the "force and effect of a legal decision." The 1976 memorandum was followed by MSHA even though Conrad Spangler, an MSHA subdistrict manager, testified that, without regard to the 1976 memorandum, it was his opinion that the Alexander Brothers' operation was not a coal mine. Mr. Spangler did not explain the basis for his opinion but he believed that the processing of refuse piles was a valuable cleanup operation. It is clear that the administrative law judge is not bound by the opinion of MSHA personnel as to matters of law, especially when they were actually following the 1976 memorandum by inspecting reclamation operations and issuing citations for violations of the Act.

~FOOTNOTE_TEN

Section 3(h) of the 1977 Act reads as follows:

"(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;

"(2) For purposes of titles II, III, nd 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;
* * *."

~FOOTNOTE_ ELEVEN

The court in Stoudt's Ferry noted that "[a]lthough it might seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meanings attributed to it--the word means what the statute says it means." Stoudt's Ferry at p. 592. The point is equally well taken in the instant case.

~FOOTNOTE_TWELVE

A case can be made that Congress intended that even the specifically enumerated impoundments, retention dams, and tailings ponds were covered by this definition of "mine" in the Coal Act. This legislative history of the 1977 Act states:

"Title I of S. 717 contains amendments to the definitions in the Coal Act, which reflect both the broader jurisdiction of that Act, and makes refinements which nearly seven years of experience with the administration and enforcement of the Act have indicated are necessary.

"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."" Senate Report No. 95-181.

~FOOTNOTE_THIRTEEN
In both Acts, the phrases are clearly stated in the alternative. In context, no material distinction attaches to the use of the words "and" in the 1969 Act and "or" in the 1977 Act.