CCASE:
SOL (MSHA) V. MINERAL COAL
DDATE:
19840404
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. MINERAL COAL SALES, INC., RESPONDENT	CIVIL PENALTY PROCEEDING Docket No. VA 83-26 A.C. No. 44-05226-03501 Docket No. VA 83-36 A.C. No. 44-05226-03503 Docket No. VA 83-39 A.C. No. 44-05226-03502 Docket No. VA 83-44 A.C. No. 44-05226-03504 Mineral Siding

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Bobbie S. Slusher, President, Mineral Coal Sales, Inc., Norton, Virginia, pro se, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory standards promulgated pursuant to the Act. Respondent contested the proposed assessments, and the cases were heard in Wise, Virginia, on November 22, 1983. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been carefully considered by me in the course of these decisions.

Issues

A critical issue raised by the respondent in these proceedings is one of jurisdiction. In its answer to the

proposals for assessment of civil penalties, the respondent asserted that its Mineral Siding facility is not a "mine" within the meaning of the Act. In a motion filed by the respondent seeking dismissal of these cases for lack of jurisdiction, the respondent again asserts that its facility is not a "mine" within the meaning of the Act. Relying on the Commission's decision in Secretary of Labor v. Oliver M. Elam, Jr., Company, Inc., 2 MSHC 1572 (1981), the respondent contends as follows:

> (1) Respondent is the owner and operator of a commercial loading facility on the N & W-Southern Railway which loads coal onto rail cars.
>
> (2) Respondent's customers are coal brokers who pay it to load coal onto the rail cars.
>
> (3) The brokers arrange for delivery of the coal by truck to the facility, and then for delivery by rail car to their customers.
>
> (4) The facilities for loading coal consist of a hopper, a crusher, conveyor belts, and a front-end loader.
>
> (5) Respondent does not purchase and market the coal that it loads, but rather acts as a third-party which merely loads coal for transportation to customers from disinterested brokers.
>
> (6) Respondent crushes the coal to facilitate its loading business.

Assuming that the respondent is subject to the Act, the next question presented is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of any civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalties to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business,

(5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Discussion

The citations which are in issue in these proceedings are as follows:

Docket No. VA 83-26

Section 104(a) Citation No. 2039607, issued on December 28, 1982, cites an alleged violation of 30 CFR 50.30, and the condition or practice is stated as follows:

> The operator of this active mine has not submitted a quarterly employment report for the 3rd quarter of 1982 (July-Sept.). This mine re-opened 07-01-82.

Docket No. VA 83-36

Section 104(a) Citation No. 2153470, issued on March 1, 1983, cites an alleged violation of mandatory health standard 30 CFR 71.803, and the condition or practice is stated as follows:

> A periodic noise exposure survey for the last 6 months has not been submitted to MSHA at Norton, Virginia. There are 2 employees to be surveyed at this active mine.

Docket No. VA 83-39

Section 104(a) Citation No. 2039612, issued on January 17, 1983, cites an alleged violation of 30 CFR 50.30. The described condition or practice is as follows:

> The employment reports filed for the 3rd and 4th quarters of 1982 were inaccurate in that each report showed "none" for the average number of workers and "none" for the total number of employee-hours worked. The on-shift record book showed the mine operated during each month of each quarter reported for.

Docket No. VA 83-44

Section 104(a) Citation No. 2153469, issued on March 1, 1983, cites an alleged violation of 30 CFR 77.1705, and the condition or practice is as follows:

> The superintendent Donald P. Slusher has not attended a first aid refresher class in the last calender year. The last training was on 05-23-1981.

Petitioner's Testimony and Evidence

Donald R. Saylers, Supervisory Inspector, MSHA Norton, Virginia, Subdistrict Office, testified as to his background and experience, and he confirmed that he supervises nine inspectors in the performance of their inspection duties. He identified Hobert Bentley as the inspector who issued the citations at issue in this case, and he confirmed that Mr. Bentley is deceased.

Mr. Saylers confirmed that he was familiar with the citations issued by Mr. Bentley, and that he reviewed and discussed them with him prior to his death. He also confirmed that he was familiar with Mrs. Slusher's loading facility, and he stated that she operated the Clifton Mining surface mine sometime during 1974 to 1976, and changed its name to Mineral Developers sometime during the period 1976 to 1979. At the time she started the facility, Mineral Developers was stripping coal, and after mining ceased at the facility, the surface facility continued on and was known as Mineral Siding (Tr. 30-34).

Mr. Saylers identified Exhibits P-1, P-2, and P-3 as MSHA Legal Identity reports on file in his office for the facility in question. With regard to Exhibit P-3, showing a transfer of the site on July 1, 1982, from Summit Resources back to Mineral Coal Sales, Mr. Saylers explained that Summit Resources was under a Federal court order to permit MSHA entry to the property for inspections, but that he was informed that Summit Resources no longer was there and that Mrs. Slusher had again resumed responsibility of the loading facility (Tr. 35).

Mr. Saylers confirmed that he has visited Mrs. Slusher's loading facility on numerous occasions, the last time being three months prior to this hearing. He stated that at that time the facility was not in operation because the stationary crusher on the loading facility which is used to size coal was broken down. Mr. Saylers identified a photograph of Mrs. Slusher's residence, which is also used as the mine offices of Mineral Coal Sales and Hubbard Enterprises, and he confirmed that the structure is on the mine site (Exhibit P-4).

Mr. Saylers stated that the coal is transported to the facility by truck, and it is then weighed and dumped at

several stockpile locations. He identified exhibits P-5 and P-6 as photographs of some of the stockpiles. He confirmed that the coal which is brought in by trucks is dumped in separate stockpiles, and he "assumed" that this is because it is from different coal seam sources (Tr. 39).

Mr. Saylers identified exhibit P-8 as a trailer adjacent to the scale where the coal is weighed before it is dumped, and exhibit P-7 as a sulphur machine and ash oven used to determine the sulphur and ash content of the coal. He observed this testing equipment in the trailer where the scaleman weighs the coal. He also identified exhibit P-9 as a photograph of the front-end loader which is used to load the coal from each of the stockpiles into the hopper of the portable loading unit. He described the loading process as "unique" in that the railroad cars which are being loaded remain stationary as the mobile loading unit loads each car. The front-end loader is used to load the coal from the particular stockpiles which are nearby, but each railroad car is not loaded with coal from the same pile. The front-end loader may load coal taken from different piles into the hopper before it is loaded on any particular railroad car, and Mr. Saylers "assumed" that this loading procedure involved the mixing of coal which has been taken from different coal seams and stockpiled by seam. He confirmed that he observed the front-end loader taking coal from two different stockpiles and dumping into the loading hopper (Tr. 39-42).

Mr. Saylers explained further that exhibit P-9 is a photograph of the front-end loader dumping coal into the hopper as shown in exhibit P-11. After it is dumped into the hopper, the coal goes through a crusher, comes out onto the belt line of the mobile loading unit as shown in exhibit P-11, and is then dumped directly into the railroad car. The mobile loading unit is on a track so that it can adjust the two directional belt lines into the particular car which is being loaded (Tr. 43-44).

Mr. Saylers stated that on the basis of his observations of the loading process at Mrs. Slusher's facility, as well as his experience and knowledge of the coal mining industry it is "a fair assumption" that a coal "blending process" takes place at the facility. He based his conclusion on the fact that after the coal is stockpiled in separate piles, and after it is tested for sulphur and ash content, the mixing or blending takes place when coal is taken from different piles and loaded into a common hopper for loading onto the railroad cars in its "mixed or blended" state. His experience indicates that the mixing of coal from different piles where the sulphur or ash content may vary, results in a mix or blend of the desired final ash or sulphur content. Further,

Mr. Saylers indicated that in his 23 years of experience in the coal industry, he has never known a railroad car of coal being sold without some kind of predetermined ash or sulphur content specifications being placed on it by the purchaser (Tr. 45-48).

Mr. Saylers identified exhibit P-10 as a photograph of a separate stationary "grading tipple" used to make stoker coal, lump coal, or "egg coal" for domestic use. He described the term "making coal" as the grading process which takes place after the coal is dumped into the hopper by a loader. The coal moves along the belt shown in exhibit P-10 where it is sized by means of a screen. Different sized screens are used to produce different coal products (Tr. 43). He confirmed that this particular operation is separate from the operation used to load the railroad cars (Tr. 44).

In further explanation of the separate grading tipple, Mr. Saylers stated that its primary use is for retail "house coal" where customers may buy a truck load or so, but he confirmed that he had no knowledge as to whether or not that coal was from the piles loading onto the railroad cars. Although he stated that the coal came "out of the yard--out of their stocking area," he personally never observed such coal being processed through the separate grading tipple used for domestic sales (Tr. 49).

On cross-examination, Mr. Saylers confirmed that when he visited the respondent's facility in July 1982, he was there to inspect the facility in accordance with a court order issued against Summit Resources (Tr. 51). He also confirmed that at no time has MSHA ever been refused entry onto the facility by anyone connected with the respondent Mineral Coal Sales Inc. (Tr. 52).

Mr. Saylers testified that he again visited the facility in December 1982 when the citation for failure to file certain reports were issued, and that since Mrs. Slusher was in Florida, he dealt with a foreman who was on duty (Tr. 58). He testified as to certain observations which he made while he was there. He confirmed that the setting on the crusher in question was already set, and at no time has he ever observed anyone adjusting the crusher for different sizes (Tr. 60). He also confirmed that he observed coal being dumped and weighed, and he did not inquire as to the names of any of the persons doing this work because it is MSHA's view that anyone working at the facility is "an employee of that mine site" (Tr. 62). He did confirm that the person who was operating the test equipment in the trailer advised him that he "worked for Jimmy Hubbard" (Tr. 66).

Mr. Saylers stated that he has personally never observed the separate stationary tipple in operation, but has observed a loader putting coal into it from the highway while driving by, and he assumed that it was running (Tr. 68-69).

Mr. Saylers testified that when he was at the facility he observed Donald Price Slusher, Mrs. Slusher's brother-in-law, and Michael Slusher, her nehpew, performing work in connection with the mobile loading unit. Price was operating the unit, and Michael was doing some maintenance work (Tr. 70). He confirmed that he was not with the inspector in March 1983, when he issued the citations for failure to take a noise survey and failure by Mr. Slusher to take first aid training, but that he did discuss the citations with the inspector who issued them (Tr. 75).

Mr. Saylers stated that except for the mobile loading unit which runs on rails, the respondent's loading facility is no different from other loading facilities which he has observed. The only thing that sets them apart, is that other facilities he has observed utilize stationary loading equipment. When asked to characterize the respondent's facility, Mr. Saylers responded as follows (Tr. 79-81):

> A. I said it was a unique situation, but it is no different from any other loading facility except this one is mobile, runs on a rail, and the others are stationary.
>
> Q. What would you classify it? Is it a prep plant or is it a cleaning plant?
>
> A. It's a loading facility.
>
> Q. It's not a prep plant? It's not a cleaning facility?
>
> A. I couldn't say that it's a cleaning facility.
>
> MR. CRAWFORD: Just talk about the machinery that loads the coal.
>
> JUDGE KOUTRAS: Hold it. I've got a rubber-tired front-end loader; that's P-9. P-11 is a mobile loading unit with a hopper, bridge crusher and conveyor belt--that's what somebody said on the back. What are you asking him?

MS. SLUSHER: I'm asking him what he classifies this as.

JUDGE KOUTRAS: He doesn't have to classify this as anything. What he has to do is identify it. What is it? What MSHA has done is classify your whole loading operation, including all these pictures, in one big bag and they say it's a custom preparation plant isn't that so, Mr. Crawford?

MR. CRAWFORD: That's basically it.

JUDGE KOUTRAS: At this time you're asking him how you classify the machinery as shown in P-11.

THE WITNESS: It's a loading facility.

BY MS. SLUSHER:

Q. Does it have a picking table?

A. We have several loading facilities that don't have a picking table.

Q. But does this particular one have a picking table?

A. If it does I'm not aware of it.

Q. Does it have any method for extracting impurities out of the coal?

A. It's not a cleaning plant. I said it's a loading facility.

Q. It has no method of separation them?

A. No, ma'am. That's only done in a cleaning plant.

Q. So when you talk about processing--when you say coal is processed, what are you talking about?

A. Processed can be anything; anything that you do to the coal.

Q. If I dump it, it's processed?

A. Blending, mixing, sizing, testing; anything that you do to it is processing.

JUDGE KOUTRAS: This particular mobile unit, all it does is load? It doesn't do these other things?

MR. CRAWFORD: It was stated previously there was a crusher on there.

THE WITNESS: There is a crusher; that's right.

MS. SLUSHER: We don't dispute the crusher.

BY MS. SLUSHER:

Q. But you have not observed anything whatsoever that makes it look like anything other than just crush the coal and put it on the car?

A. I have observed a particular size being put on the railroad car, yes.

Q. But not custom adjustments or anything like that?

A. I have not observed--

JUDGE KOUTRAS: When it comes your turn, if you can convince me that the only thing P-11 does is crush the coal to one consistency from time immemorial to load then that's all it does. What that means--we'll see what it means.

MS. SLUSHER: I guess I've belabored the point more than I should.

JUDGE KOUTRAS: I guess that's the point you're trying to make. It just sizes coal to one size. It processes coal to one size?

MS. SLUSHER: Right.

In response to further questions as to what he may have observed when he visited the facility, Mr. Saylers testified as follows (Tr. 83).

BY MS. SLUSHER:

Q. Was there any conversation with anybody about--as far as the dumping concerning individual piles of coal being from individual operators?

A. I talked with--I guess he was a scale man--where the coal come from first of all because I was concerned and interested. A lot of times I find out new mines and so forth from asking questions. He told me that most of the coal

was coming out of the State of Kentucky; that's where it was being trucked from. H e said there was different seams, different qualities of coal. That's why it was being separated. I didn't pursue why you dump it here and why you dump it there, because like I said, again, it's none of my business. The thing that concerns me was the way--method they were dumping it--the way they were ramping it, some of the trucks backing up on the ramps. I'm more safety oriented than I am blended coal, you know.

MS. SLUSHER: That's what I'm getting at--he was saying it was dumped in individual piles. That implication is that they tested it first and then put in in the piles. Now what our position is that it was brought in and dumped and then tested to pay the operator, the people we got the coal from; not for any other purpose. That's the reason it was kept in separate piles.

MR. CRAWFORD: What was your observation? You observed the latter. Is that correct?

THE WITNESS: Yes. I observed it after the coal was being dumped in the particular piles. I observed the guy taking samples and I asked him what are you doing. He said we're checking to see what the ash is and we're checking to see what the BTU is because, you know, the different seams of coal--

MR. CRAWFORD: The government would have no objection to stipulate as to that observation that the testing occurs after the stockpiling.

MS. SLUSHER: I have no further questions.

REDIRECT EXAMINATION

BY MR. CRAWFORD:

Q. You did say in your previous testimony that you were at the site of Mineral Siding facility on December 28th, 1982 in relationship to this one citation regarding employment? Do you recall that situation?

A. Yes.

Q. When you were there did you observe the facility being operated?

A. Yes.

Q. And there were employees there performing certain tasks in loading coal. Is that correct?

A. Yes, sir, there was.

Q. And about how many?

A. There was two men at the loading facility and there was one man at the--weighing coal and there was another man there that was directing the trucks where to dump and so forth.

Q. At the loading facility what were these two employees doing?

A. Well, we observed them in preparation for starting and then also observed one man running the front-end loader and one man was running the loading facility itself.

Q. The mobile--

A. Yes.

Q. So you did observe employees at the site at that time?

A. Yes.

Q. Concerning the mobile loading facility we discussed previously, there was a crusher located on there. Is that accurate?

A. Yes, sir.

Q. Can that be adjusted to certain sizes of coal?

A. All of the stationary crushers that I have been acquainted with are adjustable.

Q. We're talking about the crusher on the mobile loading facility. Is that correct?

A. Yes. Of course, they just installed a new one and I don't know what type they put on. I'm assuming that it is adjustable, but I can't say that it is.

Q. In reference to the laboratory, the trailer type facility that was located at the Mineral Siding facility, you observed it being utilized and in operation in conjunction with what was happening at the facility?

A. Yes, sir.

MR. CRAWFORD: I have no further questions.

JUDGE KOUTRAS: Do you have anything else?

MS. SLUSHER: Again, he did not observe anything being adjusted on the crusher.

THE WITNESS: At the time I observed it, no.

Respondent's Testimony and Evidence

Price Slusher, confirmed that he is the brother-in-law of Bobbie S. Slusher, and he testified that he is presently employed by Mineral Coal Sales, Inc. He stated that during the period July 1, 1982 to March 1, 1983, he was employed by Interwise and was not under the control of Mineral Coal Sales, and was not paid by Mineral Coal Sales. He stated that in his employment with Mineral Coal Sales, he acts as the facility foreman or superintendent, and his duties include mechanical work and the operation of the tipple. He had the same duties when he was employed by Interwise (Tr. 131).

Mr. Slusher stated that his involvement with the coal loading as an employee of Mineral Coal Sales begins when he receives instructions from Kim Reed with regard to the loading of coal. He identified Mr. Reed as an employee of Jim Hubbard, and Mr. Slusher stated that the crusher has no picking table, and that there is no available method for separating the coal or making any coal sizing adjustments to the crusher, and that "they're all run through the same thing--the same sizes" (Tr. 132). He further described his duties as follows (Tr. 132-133):

Q. Kim Reed is an employee of Hubbard who instructs you what cars to load?

A. That's right.

Q. Where is the coal? Is the coal all together in one pile or many piles?

A. No, it's in many piles. It's in separate piles and he instructs us most of the time by a little note telling us what bucketful to pick up here and what bucketful to pick up in another pile and another pile, however his mixture is that he wants.

Q. Do you have any idea why the coal is put in separate piles? A. It's because of a different grade coal.

Q. Different grades. Does that mean from different operators or--

A. Different operators.

Q. Do you have any knowledge of who owns that coal?

A. No. Not at the point till it comes to my dock. Then Hubbard Enterprises, I suppose owns it from there on.

Q. You're not familiar where the coal is coming from as far as an individual mine?

A. No.

Q. Are you familiar with what custom preparation of coal is? Do you understand custom preparation of coal?

A. I don't know what you mean by that.

Q. Well, do we do anything that makes that coal specifically--as Mineral Coal Sales, does Mineral Coal Sales do any process that prepares that coal for a special person or a special customer?

A. No, not in our process we don't. As I say, all we do is load what they say to load.

Q. And we don't get involved with picking out or taking out any kind of impurities or washing?

A. No.

Q. Does Hubbard Enterprises exercise any jurisdiction over Price Slusher? Does he instruct you as to your duties?

A. No, other than just what coal to load.

Q. And he doesn't pay you?

A. No.

Q. He doesn't furnish any side benefits to you?

A. No.

Q. Are you aware of who owns Hubbard Enterprises?

A. Jim Hubbard, I suppose.

Q. To your knowledge has Mineral Coal ever had any interest in Hubbard Enterprises?

A. No.

Mr. Slusher testified that mining first began at the respondent's facility sometime in 1979, and that Mineral Developers constructed the loading dock and operated the facility. Mineral Developers and Mineral Coal Sales are owned by the same individual (Tr. 134). Mr. Slusher stated that he was employed by Mineral Developers as a foreman, and after mining ceased, coal loading continued under the same procedures followed at the present time (Tr. 135). Coal was simply loaded for a fixed fee, and no testing or coal quality services were provided by the respondent (Tr. 135).

On cross-examination, Mr. Slusher testified that when he worked for the Interwise Corporation from July 1, 1982 to March 1, 1983, the company was owned by a Mr. Shelcy Mullins. Mr. Mullins is not related to him, and Mr. Mullins usually came to the site to check the work and instruct him on what he wanted done. Mr. Slusher stated further that he performed maintenance work and operated the loader, and was paid by checks issued by Interwise (Tr. 136).

With regard to the present coal loading procedures, and the instructions from Hubbard Enterprises employee Kim Reed, Mr. Slusher stated as follows (Tr. 137-139):

A. Kim will usually bring a whole pad out--a little piece of paper out and he'll have wrote down on it how many buckets of this coal or how many buckets of that coal out of each pile, you know, how many buckets full he wants to put in the cars. And that's what we do. And he'll usually have on there four cars or five cars or whatever he wants loaded of that mixture, you know.

Q. And then he may come along and give you different instructions for a different set of cars?

A. That's right. He'll make any other instructions wrote on the same piece of paper.

Q. To your knowledge, what happens to the coal after you load it?

A. Other than the railroad pulls it out, that's as far as I know.

Q. Did Mr. Hubbard ever mention to you where it goes or who he sells it to?

A. No, he sure doesn't.

Q. Do you have any idea?

A. I haven't any idea where it goes to. It's not many operators that will tell you that.

Q. You also stated that the coal is stockpiled in many piles as it comes in from independent operators or other different types of miners?

A. That's right.

Q. Do you know where they come from or where the coal comes from at all?

A. No, sir, I sure don't.

Q. In this area of the country?

A. They'll say Kentucky or they'll say--they won't go into no specific details of where the coal come from.

Q. Do you do any of the testing?

A. No.

Q. You're aware that there is some type of testing going on at that facility?

A. Well, yeah--they don't tell us anything about the testing.

Q. Who does know about the testing?

A. Kim Reed does.

Q. But they come in with different grades according to wherever the particular truckloads came from, whether it be Kentucky or wherever?

A. That's right.

Q. And then you load them per instruction from Mr. Hubbard?

A. That's right.

Q. A different number of railroad cars per instruction?

A. Right.

Q. Different mixes, different shovelfuls or according to what is instructed and they may vary from day to day?

A. That's right.

Q. So then there are different mixtures or blends that occur that are loaded on these railroad cars?

A. That's right.

With regard to any exposure to potential hazards by employees on the facility, Mr. Slusher testified as follows (Tr. 139-141):

Q. What if someone was injured on the premises? Who would have any type of training or control--you are a foreman that's part of the loading process here. What if an injury would occur or dangerous situation might occur in your operation? What control do you have over that?

A. Yes, I've had first aid training and also as far as I know everybody on the dock has had first aid training.

Q. What about--you don't perform the testing but you mentioned that Hubbard Enterprises is involved in that. Is that accurate?

A. That's right.

Q. Some of them do the testing that occurs in the facility at the testing trailer or whatever--laboratory there?

A. That's right.

Q. Do employees of Hubbard do any other things besides just the testing? Do they help in the loading?

A. No, they don't help in the loading.

Q. But they are involved in the testing of stockpiles or the coal as it comes in to determine what grade it is. Is that correct?

A. Yes.

Q. So as a truck pulls up and unloads a load of coal they may be out there adjacent to it somewhere taking a sample to test. Is that correct?

A. That's correct.

Q. So they could be affected by what's happening in the yard as far as the movement of those large trucks and dumping of those piles and possibly a dangerous circumstance could develop. Is that correct?

A. Most of the time when they're taking a sample they pick between trucks. They're not right there when a truck dumps as a general thing. They're not there when a truck actually is in the process of dumping.

Q. Do they ever come into your work area as you're loading the coal--after the coal is brought in and stockpiled and they maybe perform tests and then--of course, how you load it. You go with a front-end loader and take a shovelful here and a shovelful there. Are they out there when you're doing that process at all?

A. They might pass through.

Q. How about when you're actually loading it into the mobile loader which is loading the railroad cars out there? Are they at any time out there testing coal to make sure that it's going in at the correct grade or anything like that?

A. No, they're not there.

Q. They do that before?

A. Yes.

Q. So they are out in the work area when you are taking different buckets?

A. They're more or less passing through. They don't stay out there or anything like that.

Q. But they would be proximate to the front-end loader that's working out in that area or could be?

A. Could possibly.

In response to further questions, Mr. Slusher indicated that he personally had no way of knowing whether different blends of coal were being mixed on any given day. He also indicated that when he was employed by Interwise, all of the equipment he used and worked on belonged to Interwise, and any citations issued by MSHA should have been served on that company (Tr. 144). He confirmed that the policy of Mineral Sales Company is to conduct morning safety inspections of the facility (Tr. 145).

Mr. Slusher testified further that Mineral Coal Sales has operated the present loading facility since March 1983, and that he and Michael Slusher are the only employees. At the time Interwise operated the facility, they had two employees, and Hubbard Enterprises also has two employees. He confirmed that at any given time, a total of four employees work at the facility. The trucks which haul the coal in are owned by independent truckers (Tr. 153-154). The loader shown in the photographic exhibit is owned by Mineral Sales, but it is not the same loader which was operated by Interwise in March 1983, and he described the differences in the two loaders (Tr. 155).

Kim Reed, testified that he is employed by Hubbard Enterprises, and has been so employed since June 1982. He is a state certified dock foreman, and has been certified by the State of Virginia as "an approved competent" miner since 1981. Mr. Reed confirmed that he was present and working on the facility during the time Interwise and Mineral Coal Sales were involved in the loading operations (Tr. 161).

Mr. Reed testified that Hubbard Enterprises is owned and operated by Mr. James Hubbard and his wife. They work together in their office on the facility, and Mrs. Hubbard serves as the secretary. Mr. Reed examined a copy of a letter dated June 8, 1983, from Mr. Hubbard to MSHA official James Belcher, and he expressed agreement with the statement made there by Mr. Hubbard (Tr. 162-163).

Mr. Reed explained the procedures he follows when coal is delivered to the premises as follows (Tr. 164-166):

> A. When the coal comes in I have another employee that helps me and I'm the foreman over him. When the coal comes in we weigh it. People that regularly haul we have certain places set for them to dump. We tell them where to dump. If they bring in a different quality or a different seam that I don't know of, I call Jim and tell him where to have me dump the coal. Then we sample the coal--the guy that helps me goes down and samples the coal, gets the samples off of it. He prepares the samples and I run the samples and then I get the analysis. Then if Jim wants to--if he needs to know in a hurry the analysis I pick up the phone and I call him. I tell him what the coal line is--whether he wants them to continue to hauling or discontinue. Then I have a pad that I keep down and I write all the samples down and at the end of the day or the next morning I take the samples down to the office, lay them on the secretary's desk so she can copy the samples down--analysis.
>
> Q. So actually you don't--you take it off the pile, the individual piles. You don't take it off of a thing that's been stacked together or blended together on the site, do you?
>
> A. No, ma'am, we do not. We take it off of the truck.
>
> Q. They say in this letter that they run ash and sulfur and BUT and FSI. Is that correct?
>
> A. Yes.
>
> Q. Is there any other test that's done?
>
> A. No, there's not.
>
> JUDGE KOUTRAS: What's FSI?
>
> THE WITNESS: It's free swelling index.
>
> BY MS. SLUSHER:
>
> Q. Do you do any fluidity tests?
>
> A. No, ma'am, we do not.

Q. Do we have the capacity in the lab to do the fluidity test?

A. No, ma'am, we did not.

JUDGE KOUTRAS: Was that a slip of the tongue when you said we?

MS. SLUSHER: Well, that's my equipment.

BY MS. SLUSHER:

Q. Do you make any reportts to any companies concerning what's in the pile? When you take a sample off the pile here do you make a report to any end users of the coal what's in that pile?

A. To the people we ship the coal to?

Q. Yes.

A. No. The only thing we do--the only report taken is the car--after the car is loaded we sample the cars. That is the only--we take the car samples and I give them to--take them to the office. And then Jim relays the message and reports to them. I don't give analyses to none of the companies that we ship to. As a matter of fact, he has ordered me not to give them. If he's out of town or anything when they call I don't give them to them.

Mr. Reed confirmed that the laboratory personnel are employees of Hubbard Enterprises, and that Mr. Hubbard buys all supplies and pays for all required maintenance on his equipment. Mr. Reed also confirmed that each morning he instructs the loader operator as to how many cars of coal to load, and he also instructs him as to which piles the coal should be taken from (Tr. 166-167).

Mr. Reed stated that extraction of dirty coal or impurities does not take place, and the tipple is not adjusted on a daily basis to size the coal. All coal orders are shipped "on a certain size," and adjustments for sizing are not done. With regard to the stationary tipple, Mr. Reed stated that it is used to "grade out coal for domestic use" (Tr. 167). He explained that that this coal is "house coal" which is made available "as a more or less convenience to the people" (Tr. 168). Mr. Reed confirmed that Mr. and Mrs. Slusher have no interest in Hubbard Enterprises, and that the respondent is paid on the basis of the coal tonnage that is loaded and does not own the coal (Tr. 168).

On cross-examination, Mr. Reed stated that his duties as a State certified foreman for Hubbard Enterprises consist of direct supervision over one other employee of Hubbard who is involved in testing. He also indicated that he has no authority over the "loader man and tipple man" employed by the respondent.

Mr. Reed confirmed that when Interwise Corporation was operating on the property it did its own testing and loading of its own coal and Hubbard Enterprises tested and loaded the coal which it owned (Tr. 169). In further explanation of his duties while in the employ of Hubbard Enterprises, Mr. Reed stated as follows (Tr. 171-172):

> Q. Part of your job is to tell Mr. Slusher at Mineral Sales, Incorporated how to load the coal--what mixture of each pile. Is that correct?
>
> A. Yes, sir.
>
> Q. Each stockpile, you said, comes from a different type of mine?
>
> A. Different seam.
>
> Q. Do you test that coal to see just what quality it is?
>
> A. That's right, we do.
>
> Q. And you said that Jim Hubbard makes that determination and tells you what king of mix he wants for any particular load?
>
> A. That's true.
>
> Q. Why does he request that? Do you have any idea? Who tells him, in other words?
>
> A. The people he ships to; the people that buy the coal off of him each month. They send him a letter stating how much--the quantity of coal and the quality of coal that they need.
>
> Q. Do you know anybody that he ships to?
>
> A. Yes, sir, I do.
>
> Q. Could you name a few?

JUSGE KOUTRAS: You can't take the Fifth Amendment in this proceeding if that's what you're thinking about. I don't want you to get in trouble. Is there any proprietary confidence?

MS. SLUSHER: Confidentiality--that's one reason--I'm not trying to play ignorant when I say I don't know, but I really don't want to know because of the brokers and operators.

JUDGE KOUTRAS: If he knows--answer the question.

THE WITNESS: We shipped to Shelton Coal Company, A.T. Massey, United Coal and Coke, John McCall, Jefferson Coal, that's about it.

JUDGE KOUTRAS: He rattled off four or five people that coal is shipped to.

BY MR. CRAWFORD:

Q. They request by letter to Mr. Hubbard?

A. Yes, sir.

Q. What type of coal they want sent?

A. That's right.

Q. And he tells Mr. Slusher with Mineral Coal Sales how to mix it?

JUDGE KOUTRAS: No, he tells Mr. Reed.

THE WITNESS: I go down there every morning.

BY MR. CRAWFORD:

Q. You tell Mr. Slusher?

A. Yes. Jim tells me how many cars he needs loaded that day and as far as the mixture for the quality of coal. I write it down and I take it out and give it to Mr. Slusher.

Mr. Reed confirmed that after the railroad cars are loaded he again samples the coal in each car to determine whether or not the customer who ordered it from Mr. Hubbard is actually getting "the type or grade of coal" that he contracted for

(Tr. 173). With regard to the stationary "tipple," he identified it as a "separator" and indicated that the respondent does not use it. He explained that the separator is used to separate stoker, egg, and lump house coal by means of screens which "shakes down" the coal through holes in the screen. Separate screens are used for fines and lump coal up to four inches depending on the customers preference (Tr. 175).

Mr. Reed stated that the house coal processed by the separator is sometimes sampled, and he identified the testing and sampling equipment as machines used for testing for ash, sulfur, and BTU content, and a bunsen burner, a pulverizer, and a sample crusher (Tr. 175). Mr. Reed indicated that this test equipment is owned by Mrs. Slusher, but had no knowledge as how she is compensated for the use of the equipment by Hubbard Enterprises (Tr. 176). He also confirmed that Mrs. Slusher owns the stationary domestic coal screening equipment, and Mrs. Slusher confirmed that she is paid one dollar a ton for the domestic coal processed and sold by Hubbard (Tr. 178). Mr. Reed also confirmed that Hubbard Enterprises has an office in the same residence where Mineral Coal Sales maintains its office, and he assumed that Hubbard pays rent to Mrs. Slusher for this office space (Tr. 185).

Posthearing Submissions

Respondent filed an affidavit from James W. Hubbard, owner of Hubbard Enterprises. Mr. Hubbard states that he is in the business of buying and selling coal. He confirmed that Hubbard Enterprises and Mineral Coal Sales operate as independent business units, and are not connected by any common stock ownership.

Mr. Hubbard states that his coal is purchased from many independent operators or truckers for sale to his customers. He states further that Mrs. Slusher's Mineral Siding loading facility is used to load the coal, and that he pays Mrs. Slusher $2 per ton of loaded coal. This payment is based on the truck weights as they cross the scale, and is not dependent on the type or quality of coal purchased or sold by Hubbard Enterprises. He outlined the procedure used in the buying and selling of the coal, in pertinent part as follows:

> I. I arrange with small operators or truckers who purchase coal and then resell it to buy their coal. We agree on a price range provided it is a certain grade of coal. When the trucks deliver the coal, it is dumped on the ground in individual piles, according to the operator or seller of the coal. To see if the coal is

the same as represented to me and to protect myself to keep from losing money and buying bad coal, I will sample the coal after it is dumped. If it is obviously not what I agreed to buy, then I will contact the owner of the coal and tell them I will pay a lesser amount or they can pick up the coal. This separation into piles permits me to do this. After the coal is loaded onto the cars, I have car top samples taken from time to time. This is to protect Hubbard Enterprises in case there is some question as to what is in the cars. Over the years it has been a problem in the industry of operators and coal people doing what is called layering, that is putting the good coal on top of the trucks or cars, covering up inferior coal in the bottom of the trucks or cars. A preliminary sampling of the truck loads dumped might not reveal this problem but sampling of a loaded car would show this up. In other words when it is stirred up by loading, what you thought was good coal might be poor quality.

II. I do not furnish any analysis to my customers. They will give me an order for so many tons of coal and I will load the cars. I know what they need from having done business with them the last six years. In the event a customer ask for analysis, Standard Lab is hired to sample toe coal and give a copy of the analysis to the customer only. We get orders from many different customers for so many cars of coal per week. The only people who see these orders are myself, my wife, and our daughter. No one else has access to any of this information. I am filing with this affidavit samples of confirmation of orders from Shelton Coal Company dated September 19, 1983 and September 29, 1983. The size of 1 1/4" is the standard sizing and no adjustment is made on the crusher for any of my loading.

III. The stationery unit on the premises is used for domestic coal sales. It is primarily an accommodation of the public and the same service provided at any domestic coal yard in the country. It does not constitute any large amount of our business. We pay Mineral $1.00 per ton for each ton of coal run thru [sic] this unit. The coal

> coming in is marked for domestic use. I do not sample it. It is a completely separate operation from the loading onto the railroad cars. The reason that I decided to make house coal was because people were telling me they were having a hard time finding coal to heat their homes.

In response to the information provided by Mr. Hubbard's affidavit, MSHA asserts that in Part II of his affidavit, Mr. Hubbard's statement that "I know what they need from having done business with them the last six years," is a suggestion by Mr. Hubbard himself that his company mixes or provides coal to meet customer specifications.

Responding to the samples of confirmation orders dated September 19 and 29, 1983, submitted by Mr. Hubbard from the Shelton Coal Company, MSHA asserts that these are only modifications of orders and do not represent the contents of the original purchase orders. In support of this, MSHA submitted as Exhibit No. 12, a copy of an original purchase order, dated September 20, 1983, from Shelton Coal Company to Hubbard Enterprises. MSHA states that this order clearly shows that Shelton requested more than just tonnage in that the coal purchased was to be of (1) 13,000 BTU; (2) 10 Ash; (3) 1 Sulfur; (4) 2700 Fusion and (5) 60 Grind and a size of 1 1/4 x 0" Nutslack.

MSHA argues that the mineral siding facility is more than just a loading facility as was the situation in Secretary v. Oliver Elam, Jr. Co., 4 FMSHRC 5 (January 7, 1982). MSHA asserts that it is a facility where weighing, testing, storing, mixing or blending of coal occurs, not for the purpose of facilitating the loading process but for the purpose of preparing or milling the coal to meet customer specifications. MSHA concludes that this is coal preparation, in that a process occurs, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, which is undertaken to make coal suitable for a particular use or to meet market specifications.

Findings and Conclusions

Jurisdiction

In Secretary of Labor v. Oliver Elam, Jr., Company, Inc., 2 FMSHRC 1572 (1981), the Commission affirmed a Judge's decision that Elam was not a "mine" subject to the 1977 Mine Act. The

facts in Elam are surprinsingly similar to those presented in the instant case. Elam owned and operated a commercial dock, and 40 to 60 percent of its loading tonnage was attributable to coal. Four or five coal brokers paid Elam to load coal onto barges at the dock, and the brokers, who were not mine operators, arranged for delivery of the coal by truck to the dock, and then for delivery by barge to their customers. Elam's facilities for loading coal consisted of a hopper, a crusher, and conveyor belts. The coal was delivered to and stockpiled on Elam's property, where it was weighed by the broker's employees and placed in the hopper. A conveyor carried the coal from the hopper to the crusher where it was broken into essentially one size. The crusher could not be adjusted for variable sizing and has no grates to sort the crushed coal. The crushing was done because the conveyor belts were covered and could always accommodate large pieces of coal. From the crusher another conveyor carried the coal to the barges, but occasionally the crusher was by-passed and coal was loaded directly into the barges. All coal whether crushed or not was loaded on the barges. Elam did not prepare coal to market specifications or for particular uses, nor did it separate waste from coal or add any material to it. Thus, all of Elam's activities with respect to coal related solely to loading it for shipment.

In rejecting MSHA's assertion that Elam was a "mine," the Commission stated as follows at 2 FMSHRC 1573, 1574:

> * * * we find it significant that the types of activities comprising "the work of preparing the coal' have consistently been categorized as "work %y(3)27 usually done by the operator.' Thus, inherent in the determination of whether an operation properly is classified as "mining' is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a "mine' subject to the Act.
>
> Rather, as used in section 3(h) and as defined in section 3(i), "work of preparing coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities,

> undertaken to make coal suitable for a particular use or to meet market specifications. In the present case, although Elam performs several of the functions included in the 1977 Act's definition of coal preparation (i.e., storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers' specifications nor to render the coal fit for any particular use. We therefore conclude that Elam's facility is not a "mine' subject to the coverage of the 1977 Mine Act.

In addition to the Elam decision, Respondent relies on several past opinions rendered by the Secretary's Solicitor's Office, to support its argument that the Mineral Siding facility is not a "mine" within the meaning of the Act. Exhibit R-1 is a copy of a March 31, 1972, advisory opinion by the Office of the Solicitor, U.S. Department of the Interior, pursuant to the 1969 Coal Act, with regard to whether or not a coal processing operation in Pennington Gap, Virginia (Geisler Coal Sales, Inc.) was a "coal mine" within the meaning of section 3(h) of the Act. Based on the facts presented to the Solicitor's Office at that time, it was concluded that Geisler was not a coal mine or a mine operator subject to the Act. Subsequently, by letter dated October 10, 1980, the U.S. Department of Labor's Solicitor's Office advised the United States Attorney's Office in Roanoke, Virginia, that since it was determined that MSHA had no enforcement jurisdiction over Geisler, any efforts to collect civil penalties against Geisler should be stopped and the matter closed (Exhibit R-1).

The Geisler opinion was based on the following facts which appear at pages 1 and 2:

> 1. Mr. Geisler does not mine coal, nor does he own a "coal mine' per se. He purchases coal from one mine located in Virginia and "sizes' the coal by the use of a vibrating screen. One part of the "sized' coal is loaded into railroad cars and shipped to his purchaser. The remaining lump coal is retained in a storage yard for domestic sales. Approximately 150 tons of coal per day are processed or "sized.'

> 2. Geisler has one employee and considers his business to be a "coal grading plant.' The Virginia Department of Taxation classifies Geisler as a "coal merchant.'
>
> 3. He has no state or Federal mine identification number.

The opinion goes on to recite the statutory definitions of the terms "coal mine" and "work of preparing the coal." The Solicitor concluded that Mr. Geisler's business did not fall within these definitional categories because he had nothing directly to do with the extraction of coal from its natural deposits in the earth, and that such extraction is a prerequisite to coming within those categories of a "coal mine." Citing the dictionary definitions of the terms "custom" and "coal preparation," the Solicitor made the following conclusions:

> Thus, by the use of the phrase "custom coal preparation facilities,' it appears that Congress intended to extend the coverage of the Act to processors of coal who prepare the coal to the order or specifications of the mine operator who extracted such coal, whether the processor is independent of, or owned by, the coal mine operator. We reach this conclusion after a careful examination of the legislative history and evaluation of the overall purpose of the Act. The Act was primarily intended to promote health and safety in coal mines and thus assure a steady and reliable supply of coal in interstate commerce. Congress was well aware of the nature of the coal mining industry and the fact that most large mining operations include surface facilities for processing coal, either on or off the "area of land' where the coal is extracted.
>
> In other cases, however, such facilities are owned by a subsidiary of the mining company, or by an independent processor whose function is to process the coal for the mining company, or a group of mines or mining companies, but such processors never actually "own' the coal. It would have been anomalous and inconsistent with the purpose of the Act to extend coverage to preparation

facilities on the mine property but not to cover those off the mine property but which are owned by or under contract to the mining company, because such facilities must operate to ensure that the mined coal is "custom prepared' to the specifications of the mine operator or of the purchaser of the coal from the mine operator.

On the other hand, it is our view that Congress did not intend to extend the coverage of the Act to independent processors who merely purchase mine run coal from one mine, or several mines, and on its own initiative, subject to no "personal order or specification' of the mine operator who extracts the coal has been processed according to the processors own plans or specifications. Such a processor is much more in the nature of a wholesaler than that of a producer. It is clear that Congress intended to bring within the Act the primary producers and "custom' processors of coal to ensure a reliable supply of coal in interstate commerce.

The Solicitor summarized his advisory opinion as follows:

A. Processors of coal who prepare the coal to the order or specifications of the mine operator who extracted the coal, whether the processor is independent of, or owned by the coal mine operator, are covered by the Act.

B. "Custom coal preparation facilities' owned by a subsidiary of the mining company, or by an independent processor whose function is to process the coal for the mining company, or a group of mines or mining companies, but such processor never actually "owns' the coal (or expressed in a different manner, is performing a service for the mining company), are covered by the Act, whether on or off of the mine property.

C. Processors who purchase mine run coal from one mine, or several mines, and on its own initiative, subject to no "personal order or specification' of the mine operator who extracts the coal, and who process the coal for sale on the open market, or to occasional

> purchasers, or to its own customers or purchasers, after the coal has been processed according to the processors own plans or specifications, are not subject to the Act. Such processors fall more within the classification of a wholesaler or retailer than that of a mine operator who extracts the coal and has it processed to meet the order or specifications of the mine operator or the customers or purchasers from the mine operator who extracts the coal.

Also included as part of Exhibit R-1 is a copy of an April 6, 1972, memorandum to all MSHA District Managers advising them that the above mentioned paragraphs A through C should be followed in determining the application of the 1969 Coal Act to custom cleaning plants.

Exhibit R-2 is a copy of a March 26, 1982, advisory opinion by MSHA's Associate Solicitor for Mine Safety and Health, Arlington, Virginia, concerning the application of the Act to Chance and Montgomery Coal Co., Inc., No. 1 Tipple, Jonesville, Virginia, and the pertinent portion of that opinion states as follows:

> It is our understanding that the facility consists of a tipple and a crusher. Clean coal is initially delivered to the facility by commercial carrier and then stockpiled before loading onto railroad cars for shipment to consumers. The tipple carries the coal to a crusher where it is broken into one size. The coal is not sized according to any operator's or consumer's specification, but crushed merely to better facilitate loading of the larger pieces of coal. We further understand that the facility is not located on or adjacent to any mine property and is not an integral part of any mining operation.
>
> Generally, MSHA has jurisdiction over a loading facility where coal preparation activity takes place. However, as a result of Secretary of Labor v. Oliver M. Elam, Jr., Company, 4 FMSHRC 5 (Jan. 7, 1982), MSHA is currently reexaming loading facilities over which it is asserting jurisdiction to determine the nature and purpose of the work that takes place at these facilities. MSHA makes jurisdictional determinations based upon the factual circumstances of each situation.

> In light of the Elam decision and based on the information currently available, it is our view that MSHA should no longer exercise jurisdiction over the facility. If at any future time the nature of the activity at the facility changes, we reserve the right to reevaluate this determination. A copy of this determination will be sent to the Occupational Safety and Health Administration for their consideration.

Relying on the Elam decision, as well as well as the decisions in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir.1979) cert. denied 444 U.S. 1015 (1980); and Secretary v. Alexander Brothers, Inc., 4 FMSHRC 541 (1982), MSHA argues that the testing and blending of coal at the respondent's facility constitutes "mining" under the Act. Further, MSHA asserts that whether brokers or direct customers purchase the coal is not relevant. MSHA maintains that it is the processing of coal by mixing or blending and sizing to meet certain specifications for the market that constitutes mining activity whether it be for the brokers or their customers or whether such mining activity is performed by respondent Mineral Coal Sales, Inc., or its contractor.

MSHA's position is that the respondent is a "mine operator" within the meaning of the Act, and that its facility is a type of custom preparation facility or a facility where coal is processed, mixed, or blended in order to meet certain customer specifications (Tr. 7).

Respondent's position is that it operates a commercial loading dock, and from time-to-time loads coal for individual coal brokers for a fee of $2 a ton. Respondent denies that it is in any way involved in the purchase and sale of any coal, or that it is any way connected with the hauling or railroad transportation of the coal. Respondent maintains that its sole function is to insure that the coal is placed on the rail cars, and for that service it is paid $2 a ton, and denies that it is in any way connected with any coal preparation.

Respondent maintains that it has two employees on its payroll, and that Hubbard Enterprises is the actual coal broker for whom respondent loads the coal onto railroad cars for transportation to customers. Respondent asserts that Hubbard Enterprises has employees who weigh the coal and direct its dumping as it comes on to respondent's property. Respondent states that Hubbard Enterprises also conducts the coal analysis, and respondent denies any contacts with any of the customers who purchase the coal from Hubbard Enterprises (Tr. 8).

Exhibit P-1 is an MSHA Legal Identity Report, dated May 22, 1979, and it reflects Mineral Coal Sales, Inc., was operating a facility known as Mineral Siding, and the commodity is shown as "coal," and Mrs. Bobbie S. Slusher is shown as President of Mineral Coal Sales, Inc., and the Mine ID No. is shown as 44-05226.

Exhibit P-2 is an "updated" MSHA Mine Status and Inspection Data form dated January 11, 1982, and it reflects a change in the mine name from Norton Tipples to Mineral Siding, and the company name is shown as Summit Resources, Inc. The form also shows that the mine is a producing bituminous surface mine, with a surface loading dock. The Mine ID No. is again shown as 44-05226.

Exhibit P-3 is an "updated" MSHA Mine Status and Inspection Data form dated July 1, 1982, and it reflects a change in the mine name back to Mineral Siding, and the company name is shown as Mineral Coal Sales, Inc. The form reflects that the mine is a bituminous mine, with a loading dock. The Mine ID No. is again shown as 44-05226. A notation on the form states "change of ownership, Mineral Siding is presently being operated by Mineral Coal Sales, Inc., Summitt Resources, Inc., terminated their lease of Mineral Siding."

After careful consideration of all of the testimony and evidence adduced in these proceedings, I conclude and find that the respondent is in fact a "mine operator" within the meaning of the Act. I also conclude and find that it is an "operator" within the definitional parameters set out by the Commission in its Elam decision. On the facts here presented, the record establishes that the coal loading process carried out by the respondent in this case includes a procedure and practice whereby the coal that is ultimately loaded and shipped to the customers of Hubbard Enterprises is coal that is mixed to their particular specifications and standards. While I consider the respondent's "mining operation" to be a rather low key family operation, it does in fact qualify as a "mine" under the Act. My view here is that the operations carried out by Hubbard Enterprises and Mineral Coal Sales, Inc., consist of small family oriented business ventures which may not compare in size and scope with some other mining operations inspected by MSHA's enforcement staff. However, I take these cases as I find them, and here, I am constrained to find that the respondent is a "mine operator" within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction.

I reject the respondent's assertion that it falls within the exceptions noted by the Commission in its Elam decision.

Contrary to the respondent's arguments, and contrary to the posthearing affidavit filed by Mr. Hubbard, it seems clear to me that Hubbard sells its coal according to certain predetermined quality specifications, and that the respondent here processes and loads that coal for shipment to Hubbard's customer's in accordance with the customers customized orders. In short, I conclude that the mining operation carried out by the respondent includes the custom blending and loading of coal to meet the specific specifications and needs of Hubbard's customers. The credible testimony of Mr. Reed, as well as the candid admission by Mr. Hubbard in his affidavit that he knows the needs of his customers, are sufficient to establish that the coal which is loaded for shipment by the respondent in this case is custom-blended and loaded by the respondent to meet the specific needs of the market. Given these circumstances, I conclude and find that the facts presented in Elam are different from those presented here, and the respondent may not look to Elam for refuge. While I recognize that one may logically argue that the respondent's "mining operation" is de minimis, and that MSHA should devote its enforcement efforts to more important matters, respondent is within MSHA's enforcement jurisdiction.

Fact of Violations

Dockets VA 83-26 and VA 83-39

Respondent is charged with two violations of the reporting requirements of 30 CFR 50.30, which provides in pertinent part as follows:

> (a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter.

Citation No. 2039607, issued in December 28, 1982, charges the respondent with a failure to submit a report showing the number of miners employed at the mine for the third quarter of 1982, namely the months of July, August, and September. The inspector noted that the mine was reopened on July 1, 1982, and it seems clear to me that this information was obtained from the information shown on exhibit P-3, the updated MSHA form showing that the respondent assumed operation of the facility after Summit Resources, Inc.'s lease was terminated.

Citation No. 2039612, issued on January 17, 1983, charges the respondent with filing inaccurate employment reports for the third and fourth quarters of 1982, namely July through September, and October through December, because the reports which were submitted indicated that no employees were working at the facility, when in fact the mine records showed that the mine was in operation during all of these months.

In defense of Citation No. 2039607, Mrs. Slusher does not dispute the fact that the facility was operating during the months of July through August 1982. Her claim is that the employees were on the payroll of Interwise, Inc., and that the inspector who issued the citation assumed that they were employees of Mineral Coal Sales, Inc. (Tr. 103). Inspector Sayler testified that it made no difference who the employees were employed by, and he suggested that since the only information available to MSHA indicated that the mine identification number was recorded in the name of the respondent Mineral Coal Sales, Inc., any violation would be charged to that mine operator. Since Mrs. Slusher was shown as the mine operator on MSHA's records, the violation was properly issued to her company (Tr. 104). When asked whether Mrs. Slusher's company, Mineral Coal Sales, Inc., would still be issued and charged with the violation even if the inspector knew as a matter of fact that another corporate entity was operating the facility, Mr. Saylers answered in the affirmative, and he indicated that the mine operator of record would be held accountable by MSHA for any violations (Tr. 104).

In further defense of the reporting citations, Mrs. Slusher stated that she filed the forms "under protest," in order to achieve abatement and to avoid a possible $1,000 a day fine for each day she failed to comply. She confirmed that she wrote the words "none" on the forms to indicate that during the reporting quarters in question she was not the mine operator and in fact had no employees working for her company. She furnished copies of these reporting forms, and they are part of the record. She also furnished copies of reports she filed with the State of Virginia Employment Commission indicating that she had "no employees after June 28, 1982," or for the quarters ending June 30, 1982, September 30, 1982, or December 31, 1982 (exhibit R-5).

When asked whether the cited standard required a mine operator to file accurate reports, MSHA's counsel conceded that filing an inaccurate report does not, in and of itself, constitute a violation (Tr. 108). Further, Inspector Saylers

conceded that while section 50.30 says nothing about the accuracy of the reports filed, it was obvious that the inspector who issued Citation No. 2039607 did so because he believed that the mine was operational during the cited quarters, and that the information that no employees worked during this time period was simply not true (Tr. 110).

And, at Tr. 192:

> JUDGE KOUTRAS: Correct me if I'm wrong. Your position seems to be in this case as long as these activities are taking place at the facility, meaning at the physical place where they're taking place, you're going to hold Mineral Sales responsible for it?
>
> MR. CRAWFORD: The known operator.
>
> JUDGE KOUTRAS: You keep using the word known operator. Let's assume, again going back to my hypothetical, that Hubbard was the known operator and had an ID number. Who would you hold accountable then on a jurisdictional basis?
>
> MR. CRAWFORD: Well, both.
>
> JUDGE KOUTRAS: You think Mr. Hubbard would be in here complaining he doesn't do custom preparation and all that business. He's going to wake up one morning and be surprised that he's a mine operator subject to this Act. Isn't that possible?
>
> MR. CRAWFORD: That's very possible.

MSHA's Part 45 regulations, particularly section 45.3(a) does not mandate that an independent contractor obtain a mine identification number. It simply states that such contractors may obtain a number from MSHA by filing certain information. It would seem to me that in cases such as the ones at hand where a contractor has a continuing presence on the mine site, and has employees working around trucks and loaders weighing, dumping, and stockpiling coal, MSHA would take the initiative and require that contractor to stand up and be counted so that any violations attributable to its operation will be served directly on the contractor. On the facts of this case, it could very well be that Hubbard is as much a "mine operator"

as the named respondent in these proceedings. However, by continuing to ignore Hubbard's presence on the property for "administrative convenience," and because its easier to cite Mrs. Slusher, any safety infractions attributable to Hubbard are simply ignored.

Inspector Saylers stated that under MSHA's Part 45 Independent Contractor regulations, if an independent contractor does not file the required report, the mine owner is subject to a violation. In short, the inspector's position is that an operator such as Mrs. Slusher would be held accountable for not reporting the number of employees that an independent contractor has working on the mine site, and the reason for this is that MSHA would have no information as to the identification of any independent contractors who may be present on the property (Tr. 116).

On the facts of this case, MSHA knows full well that Hubbard Enterprises, Inc., is a separate corporate entity engaged in coal sales on Mrs. Slusher's property. Simply because Hubbard has failed to request a mine identification number to facilitate MSHA's computer tracking of its operation, MSHA acts as if Hubbard does not exist. For the lack of a number, Hubbard may continue to operate with impunity, while the respondent in this case is held accountable for failure to file forms which have absolutely no rational relationship to the safety or health of anyone on the property, including Hubbard's employees, and the independent trucking concerns which deliver coal to the property everyday. I would venture a guess that if a trucker is found to have defective brakes, MSHA would cite the respondent because the trucker has no mine identification number. If Hubbard's employees are run over by the trucks while the coal is being weighed, MSHA would cite the respondent because Hubbard has no mine identification number. It occurs to me that MSHA has a positive responsibility and a duty to insure that all corporate entities who are present and working at any mine site are subjected to the same enforcement standards as the owner of the property. The practice of looking to the property owner as a matter of administrative convenience is simply wrong, and MSHA should address itself to this. Although MSHA's counsel did a fine job as an advocate for MSHA's position, the following excerpt from the trial transcript is an example of what I believe to be MSHA's institutional attitude in cases of this kind (Tr. 117):

> JUDGE KOUTRAS: Is Hubbard Enterprises a figment of Ms. Slusher's imagination? I mean does the independent contractor have

> to put a sign up there to alert the district office that an independent contractor is working at the facility?
>
> MR. CRAWFORD: I don't think so, but I don't think it's the burden of the MSHA inspector that has the responsibility for health and safety to try to make that determination when it's not always easy to make that determination.

Price Slusher, Mrs. Slusher's brother-in-law, testified that from July 1, 1982 to March 1, 1983, he was employed by Interwise Corporation. He identified the owner of Interwise as Mr. Shelcy Mullins, and confirmed that Interwise had two employees on its payroll. He also confirmed that Mr. Mullins usually came to the property to instruct him as to his duties, and his paychecks came from Interwise (Tr. 136). Mr. Slusher also confirmed that Mineral Coal Sales has operated the present loading facility since March 1983.

Mr. Slusher clarified the ownership of Interwise, and she indicated that the company was operated by Kathy Crawford and not by Shelcy Mullins. She stated that at the time the citations were served, Interwise was operating the mine (Tr. 151). When asked to explain why Interwise was never previously mentioned in any of her prior protests, and why the citations were issued with Mineral Sales' mine identification number, Mrs. Slusher answered "you tell me" and "I don't know" (Tr. 151). Mrs. Slusher explained further that Interwise intended to purchase the facility but could not consummate the final purchase because of certain financial problems. Interwise operated the facility on a "trial basis" for a period of six months, and she received a dollar a ton for all coal processed by Interwise (Tr. 156), and took the operation back on March 1, 1983, when the financing fell through (Tr. 152). Mrs. Slusher also indicated that she explained this to MSHA when she went to an assessment conference at the Norton Office, but that MSHA took the position that Mineral Coal Sales was responsible for the citations (Tr. 151). She further explained that since Interwise was operating the facility, she had no employment or payroll records, and that is why she stated "none" on the reports in question (Tr. 153).

Mrs. Slusher confirmed that from March 1, 1983, to date, she has operated the facility as Mineral Sales, Inc., and has only had two employees, her nephew and brother-in-law (Tr. 154). She also confirmed that Interwise had two employees when it operated the facility, and Hubbard Enterprises has two employees currently working on the property (Tr. 154).

Mrs. Slusher stated that at the time she was receiving a fee of a dollar a ton from Interwise, the facility was hers, and she candidly conceded that "Interwise in a sense was substituted in the place of Mineral Coal at the point as far as the loading was concerned." She confirmed that from July 1, 1982, to March 3, 1983, Interwise "had the payroll and exercised jurisdiction over the employees on the loading, saw that the loading got done and that the loading unit or the mobile was serviced and maintained. They kept fuel on the premises and did whatever was necessary to get the car loaded." Hubbard Enterprises was also operating during this period of time, and Mrs. Slusher stated that as the owner of the property and facility, including the rail siding, mobile tipple, and scales, she collected the rents from her leases to Interwise and Hubbard. In short, Mineral Sales, Inc., owned the facility, and leased it to Interwise, who did the loading of the coal, and to Hubbard, who tested it (Tr. 157-158). She confirmed that she had no written contract with Interwise, but would not have entered into such an arrangement had she not thought Interwise would not go ahead and consummate the sale of the facility (Tr. 160).

Section 110(a) of the Act provides that a civil penalty shall be assessed against any mine operator for violations which occur in the mine. Since I have concluded that the named respondent in these proceedings is a mine operator within the meaning of the Act, the respondent is legally responsible for the citations issued. As correctly argued by the petitioner in this case, the test in Elam is not based on whose employees do what activities at a facility or what business entity does what at the facility but what activities are performed at the facility and for what purpose. Here, respondent argues that the facility was operated by Interwise Corporation at the time the citations were issued. However, the record establishes that the respondent Mineral Sales Inc., was the owner of the facility and simply permitted Interwise to operate it on a "trial basis" pending the obtaining of financing to purchase the facility. Further, Mineral Sales, Inc. was the record owner and operator of the facility, and it seems clear to me that it may be held accountable and responsible for any violations and citations which may be issued by MSHA inspectors after inspection of the mining activities taking place on the premises.

The reporting requirements of section 50.30, mandate that each mine operator complete and submit a form to MSHA in accordance with the instructions and criteria found in section 50.30-1. If an individual worked during any day of a calendar quarter, the operator is required to file the form. In support of the violations, MSHA's counsel cites

part of the language found in section 50.30-1(a)(iii), in support of his argument that whether the employees directly work for the respondent Mineral Sales, Inc., or another co-operator of the facility is irrelevant since it is only necessary that employees work at the facility.

While I agree with counsel's argument, the criteria in 50.30-1, are not without ambiguity. For example, the last sentence of the cited subsection left out by counsel does not require the reporting of personnel in shops and yards associated with other sub-units, and subsection (2) speaks in terms of average number of persons working during the quarter, and then speaks about employees on the payroll. Taken in this context, and particularly where the terms "persons," "individuals," and "employees" are used in different subsections of the criteria, I can understand the respondent writing in "none" when she believed that Interwise was the corporate entity actually required to file the forms in question. However, I consider this as mitigating the violations, rather than an absolute defense. Accordingly, both citations ARE AFFIRMED.

Docket No. VA 83-26

In this case, the respondent is charged with failing to submit a noise survey for two employees who were working at the mine. The citation was issued on March 1, 1983, the day on which Mrs. Slusher claims she took the operation back from Interwise. Her defense is that the two employees in question were not employed by her company, but by Interwise. Mrs. Slusher argues that since she had no employees on her payroll for the previous six months in question, she obviously was not responsible to survey them (Tr. 120). Inspector Saylers explained that since MSHA's records indicated that the mine was reopened on July 1, 1982, and that it was operated by Mrs. Slusher, a citation would be issued on that information alone (Tr. 120). Mr. Saylers confirmed that when Inspector Bentley issued this citation, he obviously assumed that the two employees on the premises worked for Mrs. Slusher's company, and that they needed to be surveyed for noise exposure (Tr. 120). Mrs. Slusher's rebuttal is that since the two employees did not work for her, she was not responsible for the noise survey (Tr. 120). Mrs. Slusher explained further that in order to avoid any section 104(b) withdrawal orders, she surveyed the two employees, Price Slusher, her brother-in-law, and Mike Slusher, her nephew, and she conceded that as of the date of the issuance of the citation, they were her employees, but prior to this date, they were not (Tr. 121).

Inspector Saylers testified that notwithstanding the fact that the people working at the facility were not employed by Mineral Coal Sales, Inc., they were still employed at a mine where a loading facility was being operated, and since they were employees of that mine, this activity was required to be reported to MSHA (Tr. 77). Inspector Saylers confirmed that when he visited the facility on December 28, 1982, he observed two men weighing coal, directing the trucks where to dump the coal, operating front-end loaders, etc. (86). From all of this activity, he concluded that employees were in fact employed at the facility in question.

Respondent's defense to the noise citation is rejected. As indicated earlier in this decision, the respondent was the record owner and operator of the facility and is liable for the violation. Further, the language of section 71.803, is that "each operator shall conduct periodic surveys of the noise levels to which each miner in each surface installation and at each surface worksite is exposed." Thus, any miners who are present on the property and are exposed to potential noise are required to be surveyed by the mine operator. In this case, that operator was the named respondent. Accordingly, the citation IS AFFIRMED.

Docket No. VA 83-44

In this case, the respondent is charged with a violation of section 77.1705 because superintendent Donald Slusher did not receive first aid training. The citation was issued on the day that Mrs. Slusher took the operation back from Interwise, and her defense is that Interwise should have provided the necessary training. Mrs. Slusher points out that the citation was issued on the very day that she took the operation back from Interwise. She concedes that Price Slusher was in fact her employee on that date (Tr. 122). Inspector Sayler testified that Price Slusher's last training date was May 23, 1981, and that he had until December 30, 1982, to finish the refresher course. Had the work "calendar year" not been part of the cited standard language, he would have had until May 23, 1982, to obtain the required training (Tr. 122).

Mr. Slusher testified as to his many years of experience in the mining industry, including the fact that he had taken first aid training courses in the past. I have no reason to doubt this fact, and I have considered this as part of the mitigation of the violation. However, the fact remains that under MSHA's regulations, Mr. Slusher had not availed himself of the required retraining for first aid. Accordingly, the respondent's defense here is rejected. I conclude that as the operator of the facility the respondent is liable for the violation, and the citation IS AFFIRMED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business.

The parties have stipulated that the respondent carries on a small operation and that the proposed penalties will not adversely affect its ability to continue in business. Apart from that, I conclude that the record here supports a conclusion that the respondent operates a small, family oriented facility, and that the penalties imposed will not adversely affect its ability to remain in business.

Gravity

None of the citations in these proceedings were found by the Inspector to be "significant and substantial." I conclude that they were all nonserious violations, and petitioner has not established otherwise.

Negligence

While I have considered Mrs. Slusher's assertions that she in good faith did not believe that she was a "mine operator" at the time the violative conditions occurred, and that she relied on the Commission's Elam decision as well as other opinions from the Solicitor's Office for that belief, the violations have nonetheless been attributed to her as the mine operator of record. I have considered her defense as mitigating the violations here, and I conclude that they all resulted from a low degree of negligence.

Good Faith Compliance

MSHA's counsel candidly conceded that the respondent's actions with respect to all of the citations issued in these cases stem from the fact that she relied in the Elam decision and believed that she was not subject to MSHA's enforcement jurisdiction. Under the circumstances, counsel agreed that this could be considered in mitigating the respondent's good faith in complying with the law (Tr. 124-125). MSHA's counsel stated his position as follows (Tr. 126):

> MR. CRAWFORD: We're not trying to be unreasonable. I think we're trying to go after the operator who controls the operation, supervises and controls it. And the point is through renting or through leasing, whatever, she does control the operation there on that facility. She can deny Hubbard tomorrow, as she said in her interrogatories. They have first right but not exclusive right and she does control what happens there. And so in the name of paperwork sometimes it's ridiculous to file

> another paper on an independent contractor in that type of circumstance. But I think our main concern is obviously health and safety and going to the party which we feel has control over the operations. Now she could tell him to get out tomorrow and bring someone else in and we would have no control or no--it wouldn't be clear as to who controls that equipment and that machinery.

I conclude that the respondent exercised good faith in abating all of the violations in question once the citations were issued. Petitioner's arguments that the respondent did not show good faith in connection with citation 2039612, because it resulted in the issuance of a section 104(b) order after the inspector found that the respondent "made no effort to abate" the reporting citation is rejected. Faced with the threat of a $1,000 a day penalty for not capitulating and admitting that she had employees on her payroll, Mrs. Slusher finally submitted the reports under "protest." Again, I find that these actions stemmed from her belief that she was not subject to the Act. Taken in this light, I cannot conclude that the citation is any different from the others, nor can I conclude that the respondent should be penalized additionally for exercising her rights.

History of Prior Violations

Respondent's history of prior violations is shown in Exhibit P-A, an MSHA computer print-out listing seven prior violations issued to the respondent for the period April 20, 1981 through April 19, 1983. Four of the listed violations are those in issue in these proceedings. The remaining three are all section 104(a) "non-S & S" citations, for which the respondent has made no payments. Under the circumstances, I cannot conclude that respondent's history of prior violations is such as to warrant any additional increases in the penalties assessed by me in these proceedings.

Penalty Assessments

In Docket No. VA 83-39, I take note of the fact that MSHA's proposal for assessment of civil penalty seeks a civil penalty assessment for $90 for Citation No. 2039612, issued on January 17, 1983, and this citation is listed as "Exhibit A" to MSHA's proposal. However, that same exhibit lists the citation as a section 104(b) Order, when in fact the citation for which a penalty assessment is sought is a section 104(a) "non-S & S" citation. A copy of this citation is included as part of the pleadings, as well as a copy of a section 104(b) Order, No. 2039617, dated January 24, 1983. Under the circumstances, since this apparent discrepancy is not further explained, for purposes of any civil penalty assessment, I have considered only the section 104(a) citation, No. 2039612, issued on January 17, 1983.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
2039607	12/28/82	50.30	$20
2153470	3/1/83	71.803	20
2039612	1/17/83	50.30	20
2153469	3/1/83	77.1705	20
			$80

ORDER

Respondent IS ORDERED to pay the civil penalties assessed by me for the violations in questions, in the amounts shown above, and payment is to be made within thirty (30) days of the date of these decisions and Order. Upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge