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

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEING
v.	Docket No. WEVA 83-280-R Citation No. 2022955; 9/6/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEVA 83-281-R Citation No. 2022956; 9/6/83 Docket No. WEVA 84-16-R Citation No. 2123823; 10/24/83
	Buckeye Preparation Plant

DECISION

Appearances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Contestant;
James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on July 18, 1984, in Bluefield, West Virginia, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

Completion of the Record

At the hearing, counsel for the Secretary of Labor introduced Exhibits 1 through 10 and counsel for Consolidation Coal Company (Consol) introduced Exhibits A through O. Most of the exhibits introduced by Consol pertained to the transfer to Riverside Industries, Inc., of property owned by Consol. When I began to write the findings of fact to be included in this decision, I found that the legal instruments introduced by Consol at the hearing left ambiguities about some aspects of the transactions between Consol and Riverside. Therefore, I issued on October 16, 1984, an "Order Requiring Clarification of the Record". Consol's counsel replied to that order in a letter dated October 31, 1984. Attached to the letter were eight additional agreements and letters pertaining to the property transfer.

After I had reviewed the eight additional documents and Consol's letter of explanation, I concluded that I still could not make findings of fact concerning all aspects of the property transactions without additional information. Consequently, I wrote a letter dated November 5, 1984, to Consol's counsel and requested that he provide an additional explanation of certain aspects of the property transfer. Consol's counsel replied to my letter of November 5, 1984, in a letter dated November 9, 1984. Attached to the letter of November 9, 1984, were four supplemental documents pertaining to the property transfer. After I had read Consol's letter of November 9, 1984, and had examined the four supplemental exhibits, I found that the hearing record, as supplemented, provided sufficient information to support the 21 findings of fact which are hereinafter given.

Consol's counsel requested that the above-described supplemental information be received in evidence and offered to present witnesses at a supplemental hearing, if necessary, to support and explain the exhibits. The Secretary's counsel was given the opportunity to ask for any additional information or hearings which he might believe were necessary to complete the record or explain the additional documents submitted by Consol's counsel. The Secretary's counsel requested and was granted an extension of time so that he could examine the additional materials before submitting his reply brief. When counsel for the Secretary subsequently filed his reply brief, he agreed that the additional exhibits did not change the basic issues or arguments and agreed that the supplemental documents submitted by Consol in response to my order and letter should be admitted in evidence (Secretary's reply brief, p. 1).

I find that the additional information supplied by Consol is needed to complete the record in this proceeding. Therefore, there is marked for identification as Exhibit P a two-page letter dated October 31, 1984, addressed to me from Consol's counsel, including the eight documents described in the letter and attached to the letter. There is marked for identification as Exhibit Q a two-page letter dated November 9, 1984, addressed to me from Consol's counsel including the four documents described in the letter and attached to the letter. With agreement of the Secretary's counsel, Exhibits P and Q are received in evidence.

Issues

Counsel for Consol and the Secretary filed their initial briefs on October 1, and 15, 1984, respectively, and their reply briefs on October 23, 1984, and December 26, 1984. Consol's initial brief raises the following issues:

1. Does the Commission have the jurisdiction and authority to find Consol liable for citations issued for alleged violations of mandatory standards on a refuse pile in view of the fact that the citations were issued when Consol did not operate, control, or own the refuse pile?

2. Does the Commission have the jurisdiction and authority to order Consol to abate citations on a refuse pile which Consol does not operate, does not control, and does not own?

3. Were the citations validly issued against Consol?

4. Did the Secretary prove that the cited conditions are violative of the mandatory standards and did he prove Consol's liability for those conditions?

The Secretary's initial brief expresses the issues as follows:

1. Is Consolidation Coal Company liable as operator of the Buckeye Preparation Plant for violations under the Federal Mine Safety and Health Act of 1977 related to the refuse pile associated with the plant, assuming it owns the Preparation Plant itself due to an executed security agreement?

2. Does MSHA have jurisdiction over mine health and safety matters at a mine or related facility when no miners are affected but the adjacent properties and nearby persons are affected?

3. Did the violations alleged in Citation Nos. 2022955, 2022956, and 2123823, and contested by Consol in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R, respectively, occur?

It is obvious from the differences in which the parties express the issues that Consol is claiming that it does not own, control, or operate the refuse pile which resulted from operation of the plant, whereas the Secretary is claiming that Consol's admitted ownership of the preparation plant is necessarily associated with control and operation of the refuse pile.

A discussion of the parties' contentions must be based upon an understanding of the somewhat complicated factual background leading up to the issues raised in this proceeding. The testimony of the witnesses and the documentary evidence support the following findings of fact which will be used as the basis for resolution of the issues raised by the parties.

Findings of Fact

1. Section 109(d) of the Act and 30 C.F.R. 41 require the operator of a coal mine to file with the Secretary of Labor the name and address of the mine and the name and address of the person who controls or operates the mine. Those sections of the Act and regulations also require each operator to designate a responsible official at each mine to receive a copy of any notice, order, citation, or decision issued under the Act. MSHA has prepared Legal Identity Report Form No. 2000-7 for the purpose of enabling operators to report the information required by the Act and regulations (Tr. 75; 96; 99; 101; Exh. 7).

2. According to the legal identity forms on file with MSHA, Pocahontas Fuel Company, a division of Consolidation Coal Company, began operating a mine, known as the Buckeye Mine, in Wyoming County, West Virginia, near the town of Stephenson, West Virginia, in 1963. The Buckeye Mine was then operated by Consol's Southern Appalachian Region, and then by Consol up to 1978, at which time Consol stopped producing coal from the Buckeye Mine, apparently because it became an unprofitable operation (Tr. 28; 72; 140).

3. Coal produced in the Buckeye Mine was transported by conveyor belt to the Buckeye Preparation Plant which was also owned and operated by Consol. Refuse from the preparation plant was trucked a distance of about 1,600 feet to a refuse pile (Tr. 34). That pile runs parallel to a county road for about 900 feet, extends back from the county road approximately 1,200 feet, and is about 200 feet high (Tr. 103). The pile does not impound any water because diversion ditches have been constructed to prevent water from being trapped behind it (Tr. 104).

4. Consol's operations at the Buckeye Mine and Preparation Plant were done under a lease obtained from a nonaffiliate, Pocahontas Land Company. Consol signed a letter agreement dated April 16, 1980, with Riverside, Inc., in which Consol agreed to sell to Riverside all of its personal property in the Buckeye Mine and Preparation Plant, plus Consol's leasehold rights to the property, with the consent of Pocahontas Land Company, to Riverside for $1,500,000 with a sum of $250,000 to be paid by Riverside on the date of closing and the remaining amount of $1,250,000 to be paid in seven equal installments plus 13 percent interest (Tr. 167-168; Exh. P). Riverside made a down payment of $250,000 on the date of closing, but $50,000 of that sum was used by Consol as payment for some mining supplies which had not been included in the long list of equipment which Consol had agreed to sell to Riverside for $1,500,000. Therefore, the principal sum of $1,500,000 was reduced by $200,000 to $1,300,000

and then by an unexplained sum of $2.00 to an amount of $1,299,998 which the Bill of Sale (Exh. M) required Riverside to pay in seven installments of $185,714 with 13 percent interest (Exh. Q).

5. The entire transaction between Consol and Riverside was subject to a security interest evidenced by Riverside's promissory note in the amount of $1,299,998 (Tr. 171). If Riverside defaulted in any way in making payments, Consol had the right to repossess all of the equipment in the Buckeye Mine and Preparation Plant (Exhs. G; I through O).

6. Soon after the signing of the agreements described in finding Nos. 4 and 5 above, Riverside became involved in a dispute with Consol about Consol's alleged failure to convey an additional shuttle car and some conveyor equipment. When Consol refused to agree with Riverside's interpretation of the basic agreements, Riverside brought a court action to try to obtain the disputed equipment. The action was settled so that Riverside did not have to pay an additional amount of $453,000 referred to in an Amendment to Security Agreement (Exh. L). Consol agreed to return Riverside's promissory note marked "canceled" and Consol also delivered two shuttle cars to Riverside as part of the settlement (Exh. Q).

7. An agreement between Riverside and Consol dated August 14, 1981, states that Riverside failed to pay the first installment of the purchase price when it was due on June 27, 1981, and provided that Riverside would pay $200,000 by August 27, 1981, plus $196,963.67 on or before September 27, 1981, or a total of $396,963.67 by September 27, 1981 (Exh. P). Riverside interpreted the agreement differently from Consol and paid a different amount of $354,713.74 on August 27, 1981, such amount having been comprised of a regular installment of $185,714 in principal and $168,999.74 in interest (Exh. Q).

8. Riverside then filed a proceeding in the United States Bankruptcy Court for the Southern District of West Virginia (Tr. 169). The payment of $185,714 in principal referred to in finding No. 7 above reduced the amount still owed by Riverside to $1,114,284 at the time the bankruptcy proceeding was initiated. The sum of $1,114,284 continued to be subject to 13 percent interest which amounted to $12,071.41 per month (Exh. Q). The bankruptcy court approved a settlement on March 11, 1982, allowing Consol to regain possession of its "collateral" consisting of the mine equipment in the Buckeye Mine and the Preparation Plant, including all equipment in the plant. At the time Consol reacquired its property, the 8 months of interest had increased the amount owed to Consol by Riverside to $1,211,759.20 (Exhs. H and Q).

9. When Consol reacquired the equipment in the mine, the equipment in the plant, and the plant structure itself, Consol claims that it did not reacquire any of the leasehold rights which it had transferred to Riverside and Consol claims that it has no right to perform any kind of work at the Buckeye Mine or Plant except for the express permission granted in the conveyances which specifically permit Consol to go on the mine property for the purpose of removing any of the equipment in the mine or at the preparation plant (Tr. 176-178).

10. During the period from 1978, when Consol stopped mining coal in the Buckeye Mine and ceased processing coal in the Buckeye Preparation Plant, up to June 27, 1980, when Consol transferred its leasehold and property rights to Riverside, MSHA's legal identity reports continued to show Consol as the operator of the Buckeye Preparation Plant and Refuse Pile. It is MSHA's position that a preparation plant cannot be operated without having access to a refuse pile where it can dump the refuse which results from processing raw coal (Tr. 96-97; 118-119). Under the provisions of 30 C.F.R. 77.215, MSHA declared the Buckeye refuse pile to be a hazardous refuse pile because a burning pile may produce gases which can cause explosions (Tr. 115-116). After a pile has been found to be hazardous, the operator of the pile is thereafter required to file an annual report showing what the conditions at the pile are and also is required to certify annually that the pile is being maintained in accordance with applicable engineering and environmental criteria. Consol submitted such reports in 1979 although it was not actively mining coal from the mine or processing coal in the plant (Tr. 129; Exh. E).

11. During Consol's inactive coal-producing period from 1978 to June 27, 1980, MSHA issued Citation No. 637725 [not contested in this proceeding] on May 24, 1979, alleging that Consol had violated 30 C.F.R. 77.215(h) because the slopes on the refuse pile exceeded 2 horizontal to 1 vertical and that materials from the slope were sliding out into the road after a period of rainfall so as to cause possible injury to persons traveling on the road (Tr. 64; Exh. 8). MSHA extended the time for compliance to September 21, 1979, because rainy weather had prevented Consol from completing work on the slopes. MSHA took no further action as to the alleged violation until June 24, 1981, at which time MSHA modified the citation to indicate that the operator of the refuse pile had been changed from Consol to Riverside. On that same date, MSHA extended the time for abatement to August 10, 1981, because of a work stoppage and the change in operator. The time for abatement was subsequently extended to October 20, 1981, with the observation that work was in progress to make the slopes 2 to 1 and that more time was needed to continue abatement work. A final extension of time was granted to May 1,

1982, indicating that some work had been done to abate the citation, but that Riverside was in bankruptcy and that the time for abatement needed to be extended to allow the matter to be resolved. On September 23, 1982, MSHA wrote Withdrawal Order No. 2002003 under section 104(b) of the Act on the ground that "[l]ittle effort has been made to abate the citation on the outslopes." (Tr. 65-69).

12. Before Consol conveyed the Buckeye Mine and Preparation Plant to Riverside, MSHA had sent Consol a letter dated August 30, 1979, advising Consol that its next annual report for the Buckeye Refuse Pile was due on March 4 1980 (Tr. 95; Exh. 9). Consol did not transfer the Buckeye operations to Riverside until June 27, 1980 (Tr. 171-172). Consequently, Consol should have submitted the annual report before it transferred the refuse pile to Riverside. By the time MSHA realized that the annual report had not been timely submitted, Consol had conveyed the Buckeye Mine and Preparation Plant to Riverside. Therefore, MSHA issued Citation No. 884652 on October 8, 1980, alleging that Riverside had violated section 77.215-2(c) by having failed to submit the annual report which was due on March 4, 1980 (Tr. 92; Exh. A). MSHA also issued Citation No. 884653 on October 8, 1980, alleging that Riverside had violated section 77.215-3(b) by failing to submit the annual certification for the refuse pile which was due on August 16, 1980 (Tr. 93; Exh. B). Riverside abated both alleged violations by filing the required reports within the time given in the citations (Exhs. A and B).

13. As indicated in finding No. 8 above, Consol reacquired the equipment in the Buckeye Mine and Preparation Plant, as well as the plant structure itself, on March 11, 1982. Consol did not file a legal identity report to show that it had reacquired the preparation plant until January 4, 1983. Consol contends that since it had reacquired only the plant structure and the equipment in the plant, without reacquiring any of the leasehold rights needed for producing coal to be processed in the plant, that it was not required to file a legal identity report except for the purpose of showing changes which had occurred in its supervisory personnel (Tr. 151). Consol had previously received Citation No. 881531 on March 4, 1981, for failure to file a new legal identity form to notify MSHA of a change in personnel (Tr. 152). Therefore, Consol claims that it submitted a legal identity form on January 4, 1983, solely to show the names of persons to receive correspondence from MSHA with respect to the Buckeye Plant (Tr. 155; Exh. 7). Consol claims that its filing of the legal identity form on January 4 was not intended to show ownership of the refuse pile (Tr. 155). Consol's witness testified that he entered the designation "N/A" on the form as a means of (1) advising MSHA that the plant was not operating, (2) showing

that no person was physically located at the plant for the purpose of receiving communications from MSHA, and (3) notifying MSHA that any communications about the plant would have to be sent to Consol's Regional Manager of Safety whose mailing address was then given as Horsepen, Virginia (Tr. 156).

14. Consol claims that it had made it clear to MSHA that the Buckeye Plant was inactive by sending MSHA a letter dated July 13, 1983, giving the names of persons who should receive correspondence for each of its active and inactive mines and preparation plants. That letter listed the Buckeye Mine and Preparation Plant under the heading of "Idle or Closed Mines" and indicated that correspondence about such mines or plants should be sent to the Regional Manager of Safety whose address had been changed to 28 College Drive, P.O. Box 890, Bluefield, Virginia (Tr. 154; Exh. F).

15. MSHA's inspection of the Buckeye Refuse Pile in September of 1983 showed that erosion had produced crevices and ditches in the pile to a depth of from 20 to 25 feet and that materials from the pile were continually being washed down on the county road which passes the pile (Tr. 43). Odors given off by the pile and the warmth of the pile's exterior made MSHA's inspector believe that a fire had started within the pile because erosion was allowing air to enter the pile's interior (Tr. 54). MSHA's inspector decided to issue citations for the dangerous condition of the pile to Consol because the legal identity report submitted by Consol on January 4, 1983, showed that Consol owned the inactive Buckeye Preparation Plant with which the pile had always been associated for purposes of issuing citations alleging violations of the mandatory health and safety standards (Tr. 57; Exh. 7). The inspector reasoned that Consol had not abated Citation No. 637725, described in finding No. 11, when Consol was undeniably the company which then owned and controlled the refuse pile (Tr. 65). Consol was the company which had contributed 90 percent of the refuse which made up the pile (Tr. 70). Consol's reacquisition of the equipment in the mine, the equipment in the plant, and the plant structure itself was, in MSHA's opinion, a reacquisition of control over both the preparation plant and the associated refuse pile (Tr. 59; 75; 97; 100).

16. For the reason given in finding No. 15, MSHA issued two citations to Consol on September 6, 1983. The first one was Citation No. 2022955 alleging a violation of section 77.215(a) because the outslopes of the pile were not compacted in such a manner as to minimize the flow of air through the pile (Tr. 48; Exh. 5). The citation stated that air was entering the pile through the ditches and crevices caused by erosion (Exh. 5). Section 77.215(a) requires that "[r]efuse

deposited on a pile shall be spread in layers and compacted in such a manner so as to minimize the flow of air through the pile." The second citation was No. 2022956 which alleged that Consol had violated section 77.215(h) because the outslopes of the pile exceed the ratio of 2 horizontal and 1 vertical at several locations (Tr. 44, Exh. 4). Section 77.215(h) requires that refuse piles "be constructed in compacted layers not exceeding 2 feet in thickness and shall not have any slope exceeding 2 horizontal and 1 vertical (approximately 27o)."

17. The MSHA inspector returned to the pile on October 24, 1983, and found that his previous belief about a fire in the pile was correct because smoke was now coming out of the pile and the exterior of the pile was hot to his touch. Therefore, he issued Consol a third citation, No. 2123823, on October 24, 1983, alleging a violation of section 77.215(j) because "[f]ire was allowed to exist in the refuse pile." The citation stated that the area on fire was approximately 200 feet long, 12 feet wide, and of indeterminable depth (Tr. 52-56; Exh. 6). Section 77.215(j) requires that all fires in refuse piles be extinguished in accordance with a plan approved by MSHA.

18. MSHA gave Consol to November 1, 1983, to correct the sloping, erosion, and compacting problems and to December 1, 1983, to extinguish the fires (Exhs. 4-6). Consol made no attempt to abate the alleged violations and filed the notices of contest which are the subject of this proceeding. Each of the notices of contest alleges that "Consol is not responsible for said condition and cannot abate it." Consol's evidence at the hearing shows that it is contending that Riverside is responsible for the condition of the pile because it was the last entity to operate the Buckeye Preparation Plant and deposit refuse on the pile (Tr. 168; 174-179). The reason that Consol alleges that it cannot abate the violations is that it now owns only the plant structure, the equipment in the plant, and the equipment in the mine. Consol claims that since it conveyed all of its leasehold interests to Riverside who still owns those interests, Consol has no right to go on the property on which the preparation plant and refuse pile reside for any purpose other than to remove the mine and plant equipment which it still owns (Tr. 191-192).

19. MSHA's evidence shows that Riverside deposited only a small amount of refuse on the pile and that the refuse which Riverside did deposit was correctly compacted and served a rehabilitative purpose by contributing to elimination of some of the conditions which are causing the pile to be hazardous (Tr. 69). MSHA's evidence also shows that Consol deposited 90 percent of the materials which make up the pile and Consol's failure to correct the sloping conditions when it was first

cited for that violation have resulted in the erosion which has allowed air to enter the pile and bring about the fire which now exists in the pile and which is continually spreading as time passes (Tr. 40-43; 54; Exhs. 3A, 3D, and 3E). The pile is located about 600 feet from the post office in the town of Stephenson, West Virginia, and a public school is located a short distance from the post office (Tr. 31; 34; Exh. 2).

20. The Buckeye Preparation Plant has been assigned identification No. 1211WV40070-01 (Tr. 31). After the Buffalo Creek disaster, MSHA made a survey of all refuse piles and found that a number was needed which would identify the area of each pile's location and identify the type of pile it was (Tr. 137). MSHA's witness explained that the number "1111" indicates a pile made up of anthracite coal refuse and that the number "1211" indicates a pile formed by bituminous coal refuse. The letters "WV" in the number indicate the State in which the pile is located. WV, of course, shows that the Buckeye pile is located in West Virginia. The number "4" after "WV" refers to MSHA District No. 4 and the numbers following "4" are merely sequence numbers (Tr. 118). The number after the dash shows how many refuse piles are located at a given mining site. The "01" in this proceeding shows that only one refuse pile exists at the Buckeye Mine and Preparation Plant (Tr. 102).

21. Although each refuse pile is given a number in accordance with the criteria described in finding No. 20, MSHA does not issue citations under that number. MSHA's reason for not using the refuse pile number for the purpose of citing violations is that MSHA associates all refuse piles either with a mine whose refuse produces the pile or a preparation plant whose refuse produces the pile (Tr. 98; 101; 118). MSHA assigns an identification number to all mines and preparation plants and that number never changes even if the mine or preparation plant is transferred or sold to a new or different owner from the entity which owned the mine or plant when the number was first assigned (Tr. 134-135). Therefore, all of the citations and orders discussed in this proceeding, whether issued in Consol's name or in Riverside's name, show the identification number of the Buckeye Preparation Plant, that is, No. 46-03242 (Exhs. 4-6; 8; A and B).

Consideration of Parties' Contentions

Consol's Claim that It Does Not Own the Refuse Pile

Consol's initial brief (p. 7) claims that the Secretary makes a specious argument in contending that Consol is liable for violations at the Buckeye refuse pile because Consol filed a legal identity form with respect to the Buckeye

Preparation Plant and, in so doing, became the operator to be cited for violations occurring at the refuse pile. Consol claims that it sold the Buckeye Mine, Preparation Plant, and all its leasehold rights to mine coal in that area to Riverside and that when Riverside defaulted on its payments, Consol reacquired only its "collateral" or "security interest" which consisted of the personal property in the mine, the personal property in the plant, and the plant structure itself, but did not reacquire the leasehold rights which still belong to Riverside or Pocahontas Land Corporation. Consol claims that since it did not reacquire any leasehold rights, it has no authority to go on the Buckeye mine property for any purpose other than to remove or sell mining equipment in the mine or in the preparation plant and that it has no authority whatsoever to go on mine property for the purpose of putting out a fire in the refuse pile or doing any work to make the pile conform with the mandatory safety standards.

Consol admits that it filed a legal identity report indicating that it owns the preparation plant after it reacquired the plant from Riverside, but Consol says the only reason it filed the legal identity report was to provide MSHA with up-to-date information concerning the name and address of the person to receive communications from MSHA with respect to the preparation plant. Consol claims that it entered "N/A" on the legal identity form to alert MSHA of the fact that the plant was not being operated and that it mailed MSHA a letter listing the Buckeye Preparation Plant among the idle facilities which it owns (Exhs. 7 and F). In such circumstances, Consol contends that MSHA knew that it did not file the legal identity form to accept liability for the refuse pile which it did not own or operate or control at the time the citations here involved were issued.

The arguments which Consol makes sound appealing until one examines all the facts. Consol or an affiliate did own, control, and operate the Buckeye Mine and Preparation Plant from 1963 to 1978 and, during that time, deposited 90 percent of the materials which make up the Buckeye refuse pile which is 900 feet wide, 1,200 feet long, and 200 feet high (Finding Nos. 2, 3, and 19 above). While Consol was operating the plant and depositing refuse on the pile, it had on file with MSHA a legal identify form, and during the time that Consol admittedly owned and controlled the pile, the refuse pile was declared by MSHA to be a hazardous one. That declaration thereafter required Consol to file annual reports certifying that it was maintaining the pile in accordance with safe engineering practices. Those reports were required from 1978 to 1980 even though Consol had stopped operating the plant in 1978 (Finding No. 10 above). During the inactive period,

Consol was cited on May 24, 1979, in Citation No. 637725 for a violation of section 77.215(h) for allowing erosion to develop in the pile by virtue of Consol's having failed to construct the pile with the required degree of sloping. Consol failed to abate that violation and MSHA extended the time for abatement to September 21, 1979. MSHA took no further compliance action with respect to Citation No. 637725 until June 24, 1981, when the citation was modified to recognize Riverside as the operator after Consol had made its futile sale of the Buckeye Mine and Plant to Riverside on June 27, 1980 (Finding No. 11 above).

The uncontroverted facts stated above show that Consol was the owner and operator which created the refuse pile in a manner which resulted in the pile's being cited for violating the mandatory safety standards while Consol admittedly owned it. The pile was also declared to be hazardous, thereby requiring special attention, while Consol owned and controlled it. Consol was then successful in selling the Buckeye Mine, Preparation Plant, and some leasehold rights to Riverside with the result that Riverside was, for a short time, considered by MSHA to be the operator to be held liable for correcting the hazardous conditions which existed in the pile at the time Riverside purchased it.

Consol applaudes MSHA for holding Riverside as the operator to be cited for violations after Consol sold the Buckeye facilities to Riverside, but Consol argues that MSHA improperly reverted to holding Consol liable for the violative conditions in the pile after Consol reacquired its personal property in the Buckeye Mine and Preparation Plant without apparently regaining any leasehold mining rights. Moreover, Consol claims that Riverside's retention of the leasehold rights continues to make Riverside liable for the hazardous conditions which exist in the pile and that MSHA should have remained active in Riverside's bankruptcy action to force Riverside to correct the violations in the refuse pile because Riverside is not really insolvent since its bankruptcy action pertains to a reorganization under Chapter 11, rather than an action under Chapter 7 which results in a discontinuance in business with the creditors sharing in whatever assets they can obtain (Consol's reply brief, p. 2).

Despite Consol's arguments that Riverside is financially sound and able to correct the violations in the refuse pile, Consol considered Riverside so insolvent that it entered the bankruptcy proceedings for the sole purpose of reacquiring its "collateral" or "security interest" in the mining equipment in the Buckeye Mine and Preparation Plant. Consol could have taken the position that a reorganization of Riverside's affairs under the supervision of the bankruptcy court would result in Riverside's being able to continue operating the

Buckeye properties and pay off its debt to Consol. Despite Consol's assurances that Riverside is still financially able to abate the hazardous conditions in the refuse pile, it is a fact that Riverside defaulted on its payments for the Buckeye properties and it is undisputed that Consol reacquired its equipment in the Buckeye Mine and Preparation Plant and the plant structure itself. Consol's reacquisition of the Buckeye properties necessarily carries with that reacquisition the responsibility to correct the violative conditions in the refuse pile.

It must be recalled that Consol sold the equipment in the Buckeye Mine and Preparation Plant and certain leasehold interests to Riverside for $1,500,000 and that Riverside actually paid Consol a sum totaling $604,713.74 before Consol reacquired the property (Finding Nos. 4 and 7 above). Thus, Consol received a return on its Buckeye Mine and Plant property which had been idle for about 2 years before it was sold to Riverside and reacquired. If Consol had corrected the sloping violation for which it was cited before it sold its property to Riverside, it is extremely unlikely that the erosion and fire in the pile would have developed, and Consol would not now be trying to avoid abating the hazardous conditions for which it alone is responsible.

Consol cannot successfully claim that the small amount of coal produced by Riverside at the Buckeye Mine resulted in a deterioration of the refuse pile because the inspector testified that Riverside had properly compacted the small amount of refuse which it had placed on the pile and that Riverside's use of the pile had had a rehabilitative effect on the pile, rather than a deleterious effect (Finding No. 19 above).

As a matter of fact, Consol's claim that it does not own sufficient leasehold rights at the Buckeye Mine and Preparation Plant to go on the Buckeye mine property for the purpose of correcting the hazardous conditions in the pile is not supported by the legal instruments on which Consol relies. The Security Agreement, paragraph 8, page 4, authorizes Consol "to maintain, use, utilize, sell or dispose of the Collateral on the premises of Debtor [Riverside]" (Exh. K). That language obviously is broad enough to permit Consol to use the equipment on the mine property for the purpose of correcting the hazardous conditions in the refuse pile. It is certain that Riverside would have no objections to Consol's going on mine property to correct the hazardous conditions in the pile which Riverside inherited from Consol in the first place.

MSHA's Claim that Consol Failed to Prove It Has No Leasehold Rights

MSHA's reply brief (pp. 1-2) makes the following contention:

> 2. However, it is the Secretary's position that in spite of all the exhibits submitted by Consol relating to the transactions between Consol, Riverside, and Pocahontas Land Company (Pocahontas) concerning the coal leases and preparation plant usage at Buckeye collieries and adjacent properties, there is no clear evidence that the refuse pile itself was even a part of these transactions or if it is so, which lease papers apply to its use. However, assuming that Riverside's lease did include the refuse pile, it appears likely that the subject leaseholds have, in fact, reverted back to Consol, the sublessor or Pocahontas, the lessor. Since it would appear to have defaulted on its lease, Riverside filed its petition for bankruptcy under Chapter 11. Further, there has been no evidence of any payment by Riverside to Pocahontas for the leasehold itself. Apparently, Riverside defaulted on its promissory note owed to Consol, and therefore defaulted on the lease resulting in the reversion of the subject property back to the sublessor (Consol) and lessor (Pocahontas) in accordance with general real property law. In any event, Consol has failed to carry its burden of proving its position that responsibility over the refuse pile was leased away to another entity, in this case, Riverside Industries. [Footnotes omitted.]

There is considerable merit to the Secretary's claim made in the above-quoted paragraph. In my order of October 16, 1984, I pointed out that Consol had failed to submit in evidence at the hearing a copy of the letter agreement between Consol and Riverside along with the map attached to the letter agreement. I pointed out in the order that Exhibit I provided that if there should be an ambiguity in the boundary specifications in the leasehold assignment, that the map controlled. Therefore, I requested that Consol submit a copy of the map along with other materials requested in the order of October 16, 1984. Although Consol submitted the map as a part of Exhibit P, the map is such a poor reproduction that it is impossible to determine from it what leasehold interests Consol actually conveyed to Riverside.

Consol's Claim that the Commission Has No Authority To Require Abatement

Although I have shown in the discussion above that there is no merit to Consol's claim that it has no authority to correct the hazardous conditions in the refuse pile, Consol argues

in its initial brief (p. 14) that a refuse pile may be abandoned with MSHA's permission if the pile is in compliance with the mandatory safety standards at the time the abandonment request is made. Consol says that if the pile develops problems, such as a fire in it, after the abandonment is authorized, MSHA will no longer take any action, and the hazardous condition becomes a problem for correction by the State in which the pile exists. Consol also notes that if an operator goes completely bankrupt under a Chapter 7 proceeding, as opposed to the Chapter 11 proceeding involving Riverside in this case, MSHA simply issues a closure order and refuses to allow anyone else to operate the pile until the outstanding violations are abated (Tr. 143-144).

Continuing its theme of not owning the refuse pile, Consol argues that the Commission cannot require Consol to abate a condition in a refuse pile which it does not own or control. Consol concludes its argument by saying that the Commission cannot order Consol to do an act which it cannot perform because the refuse pile is situated on property which is owned and controlled by another entity, namely, Pocahontas Land Corporation or Riverside.

Most of the arguments which Consol makes as to the Commission's lack of authority to enforce abatement are predicated on a factual background which is entirely different from the facts in this proceeding. Consol's observation that a refuse pile may be abandoned if it is in compliance with the mandatory safety standards has no application in this case because neither Consol nor Riverside ever proposed to MSHA that it be permitted to abandon the Buckeye refuse pile. Moreover, MSHA could not have authorized abandonment by either Consol or Riverside because the pile was cited for a violation of the mandatory safety standards while Consol owned it and was cited for that same violation and others while Riverside owned it. Therefore, neither Consol nor Riverside could have been permitted to abandon the Buckeye refuse pile before they had corrected the violations for which they had been cited, even if they had attempted to abandon the pile. Moreover, since Riverside was not involved in a Chapter 7 bankruptcy action, MSHA would have no reason to issue a closure order pending some day in the future when a new operator might propose to operate the Buckeye facilities.

As the Secretary argues in his initial brief (pp. 10-15), the Act was not intended to be applied in the technical and narrow sense urged by Consol. The Secretary correctly argues that MSHA has authority to cite an "operator" for violations of the mandatory health and safety standards. An operator is defined in section 3(d) of the Act as "any owner, lessee,

or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The court in BCOA v. Secretary of Interior, 547 F.2d 240 (4th Cir.1977), gave a broad interpretation to the word "operator" when it stated that:

> the Act does not limit the term operator to owners and lessees. It expressly mentions any "other person who * * * controls or supervises a coal mine." A coal mine, as we have pointed out in part III, is not merely an area of land and its facilities presently used to extract and process coal; it also includes an area of land and facilities that are "to be used" in the future for the extraction and processing of coal.

547 F.2d at 246.

Assuming, arguendo, that the evidence shows that Consol is not the owner in title of the refuse pile, it is uncontroverted that Consol was the owner of the preparation plant at the time the citations here involved were issued. It cannot be successfully argued that the preparation plant is unrelated to the refuse pile because the evidence shows that Consol created the refuse pile when it operated the plant and that Riverside continued to contribute to the refuse pile when it owned the preparation plant (Finding Nos. 3 and 19 above). While Consol claims that it does not intend to resume production of coal at the Buckeye Mine and Preparation Plant, it admittedly reacquired the plant for the purpose of selling it to anyone else who might be interested in producing coal there. It is unlikely that anyone could construct a new preparation plant at the Buckeye site any more cheaply than it could buy Consol's plant. Therefore, Consol's present ownership of the plant carries with it a possibility that coal may be mined at the Buckeye plant site in the future. Therefore, as the court stated in the BCOA case above, Consol is holding a preparation plant which constitutes "facilities" which may be used in the future for the extraction and processing of coal. Consequently, Consol is the operator of the refuse pile within the meaning of the Act and is the proper party to be cited for violations found to exist in the refuse pile.

The Commission rejected in Eastern Associated Coal Corp., 4 FMSHRC 835 (1982), the same line of reasoning on which Consol relies in this proceeding. In the Eastern case, the claim was made that Eastern was not liable for violations in a refuse pile which was created by coal production by a mine operator other than Eastern and which was located 800 to 1,000 feet from Eastern's preparation plant. The Commission held that Eastern was liable for the fire which was burning in that refuse pile even though the pile was not situated in a surface

working area where Eastern's employees were required to work or travel. The Commission also held that the Secretary is not required to show that the burning pile created a hazard to miners in the normal and reasonable course of employment. All that the Secretary was required to prove was noncompliance.

In this proceeding, even though Consol is not presently dumping refuse on the refuse pile, it is a fact that MSHA's evidence conclusively showed that materials from the pile are continually being washed across a county road which people are required to travel to reach their homes. Moreover, the pile is located only 600 feet from the post office in the town of Stephenson, West Virginia, and there is a school near the post office (Finding Nos. 11, 16, and 19 above). The Secretary's initial brief (p. 14) refers to a quotation in the Congressional Record for June 20, 1977, by Senator Kennedy in which he stated that the Act should be interpreted to "ensure that those who live around mines and who are affected by those mines or mining operations are protected from faulty mines as well as the miners themselves."

The Supreme Court has stated in several cases that Federal agencies entrusted with administering Federal statutes should be given broad powers which are to be exercised on the basis of the powers given to them by the acts they administer without regard to legal technicalities. For example, in United Gas Improv. Co. v. Continental Oil Co., 381 U.S. 392 (1965), an interstate natural-gas company purported to purchase developed gas leases in order to avoid the authority of the Federal Power Commission [now Federal Energy Regulatory Commission] to control the price of natural gas flowing in interstate commerce. The Supreme Court upheld the Commission's opinion ruling that the purchase of developed leaseholds was the equivalent of a conventional sale of natural gas subject to the Commission's jurisdiction. In upholding the Commission's assertion of jurisdiction, the Court stated that "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." 381 U.S. at 400.

The Supreme Court also held in California v. Southland Royalty Co., 436 U.S. 519 (1978), that the State of Texas could not allow production of gas from a State-owned lease to be sold in interstate commerce without thereafter obtaining permission from the Federal Energy Regulatory Commission to abandon the sale, despite the fact that the State of Texas cannot be considered to be a "natural-gas company" as that term is defined in the Natural Gas Act.

In Public Service Co. v. Federal Energy Reg., 587 F.2d 716 (5th Cir.1979), the court disposed of an argument similar to Consol's claim that it cannot be required to abate hazardous

conditions in a refuse pile which it claims not to own. In that case the court stated as follows:

> Petitioners also seek exemption from the abandonment requirement on the grounds that Superior did not have the legal authority to dedicate Texas's royalty gas, gas that Superior did not own. This argument was, however, handily disposed of in Southland, where the owners challenged Gulf's legal authority to dedicate their gas. Admitting the "appealing resonance" of the maxim that " "no man can dedicate what he does not own' ", the Court concluded that indeed he could. Id. at 527. Dedication is not a matter of a lessee's giving away or selling gas that it does not own, the Court explained, but rather a matter of changing the regulatory status of that gas. Superior's consented-to acquisition of the interstate certificate is effective to dedicate Texas's gas whatever the parties' relationship might be under local law.

587 F.2d at 720.

The Supreme Court also held in National Labor Rel. Bd. v. Hearst Publications, 322 U.S. 111, 129 (1944), that the word "employee" as used in the National Labor Relations Act was to be defined by reference "to the purpose of the Act and the facts involved in the economic relationship", rather than exclusively by reference to common law standards or local law. In Gray v. Powell, 314 U.S. 402, 416 (1941), the Court held that "the purpose of Congress which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code."

The Act here involved was intended by Congress to bring about safe and healthful conditions in the mining industry. Once an operator produces coal and creates a refuse pile, it is obligated to correct any hazardous conditions which occur in that pile, and it may not escape that obligation by selling the preparation plant associated with the pile and then reacquire the preparation plant without also reacquiring the obligation to correct the hazardous conditions which exist in the pile.

Consol's claim (initial brief, p. 12) that it is being perpetually held to be a guarantor of the pile's conformity with the mandatory safety standards is without merit because it is its act of reacquiring the preparation plant which caused MSHA to cite Consol for violations in the pile. If Riverside had not defaulted on its payments to Consol, Riverside would have continued to be held responsible by MSHA for the hazardous conditions in the refuse pile.

Consol's Claim that the Secretary Failed to Prove Violations

Consol's claim (initial brief, pp. 10-11) that the Secretary failed to prove that violations occurred is based on the contentions already rejected above, namely, that the Secretary did not prove that Consol owned or controlled the refuse pile at the time the citations were issued. Consol did not introduce any evidence whatsoever to rebut the Secretary's evidence showing that the refuse pile contained the violations alleged in the citations. Two of the citations (Nos. 2022955 and 2022956) were issued on September 6, 1983. They alleged that Consol had violated sections 77.215(a) and 77.215(h) for failure to compact the materials deposited on the pile so as to bring about a minimum flow of air and for failure to compact the refuse to form a 27-degree slope (Finding No. 16 above). Consol's initial brief (p. 10) claims that it constructed the pile before MSHA had promulgated a regulation requiring a 27-degree slope and that MSHA does not require an operator to remove old refuse and recompact it to a 27-degree slope. It should be noted that Consol was cited for the sloping violation before it ever sold the Buckeye facilities to Riverside. Consol did not abate the sloping violation nor correct the erosion in the pile and MSHA did not put any pressure on Consol to abate the violation. Instead, after Consol sold the facilities to Riverside, MSHA modified the citation issued to Consol to require Riverside to abate the sloping and erosion conditions in the pile. When Consol reacquired the preparation plant, MSHA could just as easily have modified the original citation (No. 637725) again to show that Consol was once again obligated to correct the sloping and erosion conditions in the pile. The fact that MSHA issued an entirely new citation (No. 2022956) does not change the fact that Consol was obligated to correct those conditions, especially since the conditions resulted from Consol's poor compacting procedures when the pile was originally created (Finding No. 11 above).

The third citation (No. 2123823) was issued by MSHA on October 24, 1983, and alleged that Consol had violated section 77.215(j) by allowing fire to exist in the pile. MSHA's evidence shows that when the inspector examined the pile on September 6, 1983, he suspected that a fire had started in the interior of the pile at the time he wrote the two citations issued that day, because the surface of the pile was warm to his touch. The inspector knew that the erosion which he had observed in the pile for several years was allowing air to enter the pile and he believed that the oxygen in the air had resulted in the commencement of a fire, but he could not see any smoke on September 6 to confirm his suspicions.

When the inspector returned to the refuse pile on October 24, 1983, he observed smoke and knew that the pile was on

fire (Finding No. 17 above). The witness introduced as Exhibits 3A through 3F some color photographs which clearly show the hazardous conditions at the pile. The photographs were taken on July 17, 1984, the day before the hearing was held, rather than on October 24, 1983, the day the citation was written. The photographs leave no doubt but that the refuse pile is badly eroded, is allowing materials to be deposited on the county road near the pile, and is exposing the people of Stephenson, West Virginia, to the unpleasant fumes of the burning pile.

Inasmuch as Consol introduced no evidence to rebut the Secretary's evidence showing that the violations occurred, and in view of the fact that I have hereinbefore rejected Consol's claims that it does not own or control the pile and cannot be validly cited for violations in the pile, I find that the violations occurred, that the citations should be affirmed, and that Consol's notices of contest filed in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R should be dismissed.

Consol's Complaint about the Identification No. Used to Cite Violations at Refuse Piles

As explained in Finding Nos. 20 and 21 above, MSHA developed a numbering system to identify all refuse piles following the Buffalo Creek disaster. That number for the Buckeye refuse pile is 1211WV40070-01. The first four numbers show that the pile was formed from refuse from a bituminous coal mine. The two letters indicate that the pile is located in West Virginia. The number "4" indicates that the pile is located in MSHA District No. 4. The numbers after "4" are simply sequence numbers, except that the number after the dash is intended to show the number of refuse piles at any one location.

Consol's initial brief (p. 9) contends that MSHA ought to cite violations at refuse piles under the refuse pile number described in the preceding paragraph, instead of citing violations under the identification number of the coal mine or preparation plant which contributes refuse to the pile. Consol notes that refuse piles may be used for reclamation of the coal which is deposited in them. If that occurs, the refuse piles are given their own mine identification numbers just as if they were producing coal mines.

I am discussing Consol's complaint about MSHA's choice of identification numbers in an effort to cover all of Consol's arguments, but I fail to see how the instant claim advances Consol's position in this proceeding. First, the Buckeye refuse pile is not being reclaimed by anyone to obtain coal. Therefore, it has not been given an independent

mine identification number, nor has any operator filed a legal identity form to show that it is an operator doing reclamation work. Second, all of the citations here involved contain a reference to Refuse Pile No. 1211WV40070-01 and therefore clearly identify the Buckeye refuse pile by the number which Consol would like to see MSHA use. The citations also have Consol's name in Item 6 as the operator of the refuse pile and show in Item 8 the identification number of the Buckeye Preparation Plant.

MSHA's witness testified that when an identification number is assigned to a mine or a preparation plant, that number is not changed when a different entity assumes control of the plant (Finding No. 21 above). When Riverside became the operator of the Buckeye Preparation Plant, all citations issued during Riverside's brief ownership named Riverside as the operator and continued to use the same identification number for the preparation plant which had been assigned to the plant when it was first owned by Consol.

A citation or order issued by MSHA would be useless for bringing about abatement of unsafe conditions unless it could be served upon a person who has control of a mine or preparation plant. That is one of the main reasons for MSHA's requiring operators of mines and plants to file legal identity forms so that MSHA will be able to obtain action toward abatement of the conditions described in the citations and orders. Consequently, it is the person to be served, shown in Item 5 of a citation or order, who is of primary importance in bringing about abatement of unsafe conditions. The citations involved in this proceeding were served on the persons shown as responsible in Riverside's and Consol's legal identity forms. While the identification numbers of a mine or plant help identify the facility which has contributed the materials which comprise the refuse pile, those numbers do not solely determine which entity MSHA considers to be liable for abating the unsafe conditions. Moreover, as indicated above, MSHA seems to have allowed for Consol's complaints about the identification numbers it uses in its citations and orders pertaining to refuse piles by using the refuse pile number, as well as the preparation plant number, so as to provide as much enlightenment as possible for MSHA's purposes and those of the person who is served with the citations and orders. Therefore, I find that Consol's complaints about MSHA's selection of identification numbers when writing citations pertaining to refuse plants are not well founded and must be rejected.

WHEREFORE, it is ordered:

Citation No. 2022955 dated September 6, 1983, alleging a violation of section 77.215(a), Citation No. 2022956 dated

September 6, 1983, alleging a violation of section 77.215(h), and Citation No. 2123823 dated October 24, 1983, alleging a violation of section 77.215(j), which are the subject of Consolidation Coal Company's notices of contest filed in Docket Nos. WEVA 83-280-R, WEVA 83-281-R, and WEVA 84-16-R, respectively, are affirmed, and Consolidation Coal Company's notices of contest filed in those three docket numbers are dismissed, for the reasons hereinbefore given.

Richard C. Steffey
Administrative Law Judge