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VENBLACK V. SOL (MSHA)

SOL (MSHA) V. VENBLACK

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

VENBLACK, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. WEVA 84-152-R
Citation No. 2124861; 2/22/84

Austin Black Plant

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

VENBLACK, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 84-313
A.C. No. 46-03319-03503

Austin Black Plant

DECISION GRANTING CONTEST AND
DISMISSING PENALTY PROCEEDINGS

Appearances: George V. Gardner, Esq., and J. Edgar Baily, Esq.,
Gardner, Moss & Brown, Washington, D.C., for
Contestant/Respondent;
James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Washington, D.C.,
for Respondent/Petitioner.

Before: Judge Lasher

A preliminary hearing on the record to determine
jurisdiction was held in Falls Church, Virginia on October 17,
1984.

This matter is comprised of a contest proceeding filed by
VenBlack, Inc., (herein VenBlack), on March 26, 1984, under
Section 105(d) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. 801 et seq., (herein the Act), and a civil penalty
proceeding initiated by the Secretary of Labor on August 10,
1984, by the filing of a proposal for assessment of penalty
pursuant to Section 110 of the Act.

The penalty docket involves eight citations including Citation No. 2124861 (Footnote.1) dated February 22, 1984, which is the subject of the contest proceeding. The contest and penalty dockets were consolidated for processing, hearing and decision by my order of September 6, 1984.

The issue is whether VenBlack is the "operator" of a "coal or other mine" and thus subject to the Act. That determination must be made through interpretation of sections 3(d), 3(h)(1) and (2), and 4 of the Act. 30 U.S.C. 802(d), (h)(1) and (2), and 803, to wit:

Sec. 3. For the purposes of this Act, the term --

* * *

(d). "Operator" means 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;

* * *

(h)(1). "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(h)(2). For purposes of titles II, III, and IV, coal mine" means an area of land all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

* * *

Sec. 4. Each coal or other mine, the products of which enter commerce, or the operations of products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

PRELIMINARY FINDINGS

VenBlack was incorporated in West Virginia in September 1983. In October 1983, VenBlack purchased the Chemical Products Division of Slab Fork Coal Company, which was in bankruptcy (Tr. 96; Ex. C-1). Slab Fork previously had operated what might be termed a completely integrated coal mine at Tams, West Virginia, where coal was actually extracted from the ground and then totally prepared in its Preparation Plant where it engaged in breaking, crushing, sizing, cleaning, washing, drying and mixing the coal. The Chemical Products Division, i.e., the manufacturing plant which was the only part of the Slab Fork operation purchased by VenBlack, was, and is, called the Austin Black Plant and is located on the same premises where the Slab Fork mine and Preparation Plant previously was located. VenBlack did not purchase the underground mine of Slab Fork or the Preparation Plant. In its operation of the Austin Black Plant, Slab Fork obtained the necessary prepared coal from its own Preparation Plant which had been extracted from the Slab Fork mine. All three operational phases previously were inspected and regulated by MSHA. (Footnote.2) As noted below, VenBlack obtains its "unique," carefully selected and prepared coal from outside coal producers through brokers.

Slab Fork's entire operation at Tams, West Virginia, has been closed and Slab Fork has ceased all operations of the property (Tr. 96). Slab Fork does act as a coal broker, selling already prepared coal it has obtained from entirely independent coal mine operations (Tr. 96). One of its customers is VenBlack. VenBlack has no other business arrangements, contracts, or dealings directly with Slab Fork (Tr. 96). VenBlack's sole business is the operation of the Austin Black plant where it converts already prepared coal to the product known as Austin Black which it then bags and sells to the tire and rubber industry which uses it as an additive, extender, and "chemical filler" in compounds used to make rubber (Tr. 57, 90, 97, 104-105). The coal purchased on the "outside" market (Tr. 89) through Slab Fork and from other suppliers (Tr. 109, 110) by VenBlack for this purpose mainly from the Maben Energy plants at the Pocohontas Coal vein in West Virginia has already been prepared by breaking, crushing, sizing, cleaning, washing, drying and mixing to an exact specification designated by VenBlack (Tr. 68-72). This coal has additional uniqueness since it must also be (1) bituminous, and have chemical properties and be of a character common to only approximately 5% of the coals that are available (Tr. 120, 121, 133). Upon its arrival at VenBlack's plant, samples of this raw coal are first tested to insure that it meets VenBlack's specifications, including those pertaining to chemical composition (Tr. 85, 133, 134).

The prepared coal, which must be sized in particles of no more than half-inch, is delivered to VenBlack by a contract hauler (Sullivan) who delivers it by truck (Tr. 23, 89, 110, 111). It is first placed in a "truck bin" or raw coal storage silo. Subsequently, it is transported through a network of conveyors (Tr. 111) by conveyor belt and it finally ends up on a 1,000-ton silo where it is stored (Tr. 113). From the storage silo it is transported by conveyor belt to a nearby tipple where it is "scooped off the belt" and put into two small "tanks" or silos (Tr. 113, 114).

From the two small silos the coal, of approximately the same half-inch size as that delivered by Sullivan, is then run into the top of a six-story plant and down a chute into the "mill" (Tr. 115-117). On the way it enters a "hammer mill" which ensures that no particle exceeds the half-inch requirement. (Footnote.3) The coal then enters a unique (Tr. 117) air mill grinding process which reduces the coal particles to a fine dust having the consistency of talcum powder (Tr. 32, 118, 128) called Austin Black (Tr. 119). Once the small coal particles enter the grinding stage high-pressure air "bangs" the particles against each other in a closed system resulting in their reduction to powder (Tr. 32, 90, 117-119). This "unique" (Tr. 120) product is

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then bagged (forced by high-pressure air into either plastic or paper bags) according to the needs and specifications of the ultimate purchasers/users. Once the product is bagged, it is transported to a "palletizer" (Tr. 33, 34, 90, 106) over a conveyor system, where the bags are stacked uniformly on a pallet after the air has been squeezed out (Tr. 35) to be loaded on trucks with fork lifts (Tr. 90).

VenBlack has only eight employees, including a fork lift operator, a wrapper, a bagger, a palletizer, a compressor supervisor, and a plant manager. Two employees in these occupations work at night and five work in the daytime. The plant manager is the eighth employee.

VenBlack is classified by the State of West Virginia as a manufacturing company; coal mining has a different classification (Tr. 125-126). A competitor, Harwood Chemical, produces a product (Kofil 500) similar to Austin Black and is regulated by OSHA. Harwood Chemical is located approximately 10 miles from VenBlack (Tr. 101).

MSHA and the Occupational Safety and Health Administration, both divisions of the Department of Labor have entered into an agreement ("InterAgency Agreement") to delineate their authority and jurisdiction. The InterAgency Agreement, 44 F.R. 22827-22830 (April 17, 1979), insofar as it relates to "milling," and aside from references pertinent to 1977 Mine Act provisions, provides:

Mining and Milling:

Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severance of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so excavated usually require upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

A Crude is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid containing valuable constituents in such amounts as to

constitute a promise of possible profit in extraction, treatment, and sale. The valuable constituents of an ore are ordinarily called valuable minerals, or often just minerals; the associated worthless material is called gangue.

In some ores the mineral is in the chemical state in which it is desired by primary consumers, e.g., graphite, sulphur, asbestos, talc, garnet. In fact, this is true of the majority of nonmetallic minerals. In metallic ores, however, the valuable minerals in their natural state are rarely the product desired by the consumer, and chemical treatment of such minerals is a necessary step in the process of beneficiation. The end products are usually the result of concentration by the methods of ore dressing (milling) followed by further concentration through metallurgical processes. The valuable produce of the oredressing treatment is called Concentrate; the discarded waste is Tailing. (Emphasis supplied)

Milling-MSHA Authority

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

Crushing

Crushing is the process used to reduce the size of mined materials into smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved.

Grinding

Grinding is the process of reducing the size of a mined product into relatively fine particles.

Pulverizing

Pulverizing is the process whereby mined products are reduced to fine particles, such as to dust or powder size.

Sizing

Sizing is the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

Washing

Washing is the process of cleaning mineral products by the buoyant action of flowing water.

Drying

Drying is the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.

Pelletizing

Pelletizing is the process in which finely divided material is rolled in a drum, cone, or on an inclined disk so that the particles cling together and roll up into small spherical pellets. This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes. (Emphasis supplied.)

The health and safety hazards inherent in VenBlack's operation and the correlative enforcement objective of MSHA was described by Inspector Blevins as follows:

Well, the inherent hazard, or the inherent problem with this type of an operation is they intentionally produce a 200 to 300 mesh product, and that in turn is hard to control in transferring the material to different locations where it is to be processed and bagged for sale.

Q. So what is the enforcement problem there, if there is one, or condition that you are most concerned with?

A. Well, I deal with respirable dust, that's exposure of the employees. I deal with accumulation to fine coal explosive dust.

Q. What can happen there as far as that goes?

A. Well, when you deal with a real fine float dust, there is a hazard of explosions, which there is always on-going problem of Black Lung or the respirable dust that workers are exposed. (Tr. 25).

Summary of Contentions of the Parties

I. The Secretary

A. In view of (1) the list of milling processes contained in the Interagency Agreement, *supra*, and (2) the provision of Section 3(h)(1)(C) of the Act that all facilities "used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals, and (including) custom coal preparation facilities" are within the Act's definition of "a coal or other mine," and since the Austin Black plant processes coal by milling (through crushing and pulverizing) in order to meet customer coal specifications or market specifications, the plant is a "coal mine."

B. There is no requirement that the operator of a "processing or preparation facility" must actually extract coal, nor is there a requirement that the coal be previously unprepared before it reaches a "secondary preparation facility" for the second facility to be considered a mine under the Act.

C. (1) Section 3(h)(1) of the Mine Act also provides that in making his determination of what constitutes mineral milling "the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." (2) MSHA has demonstrated expertise in inspecting facilities similar to Austin Black, has executed a continuing enforcement presence at such facility, inspects several other mines and facilities in the area, and has an MSHA office in close proximity to the Austin Black plant.

D. The Occupational Safety and Health Act of 1970 is a residual statute when another federal agency has authority to regulate. Thus, Section 4(b)(1) thereof provides:

Nothing in the Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or endorse standards or regulations affecting occupational safety and health.

II. VenBlack

A. VenBlack is a customer, consumer and purchaser only of coal already prepared to its specification, to be used in its manufacturing processes and the product delivered to its customers.

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B. The Secretary's position (Tr. 14) that "all there is a need to show that here is a processing of coal, that it is processed, it is mixed, or is . . . crushed, or is . . . sized or is . . . pulverized," over simplifies the issue; that if this were so almost every consumer of coal would be declared by MSHA to be a coal preparation facility.

C. VenBlack, the same as the coking industry and utilities, is not a coal preparation facility, does not "produce" coal and should not be under the jurisdiction of MSHA.

D. The fact that MSHA previously inspected the facility of the Slab Fork Coal Company and the process carried on at its coal mine operation and preparation plant is not relevant because only manufacturing is performed by VenBlack.

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

Early on the Secretary anticipated that toward the end of the industrial chain as minerals move from extraction toward their destination in the commercial market-difficulty would be encountered in the classification of certain firms as mining (including milling and coal preparation facilities), manufacturing, or the ultimate consumer.(Footnote.4) In the instant proceeding the Secretary has effectively shown that MSHA's regulation of VenBlack would be both convenient and expert. On the other hand, the record does not indicate that OSHA regulation thereof would be inconvenient or lacking in expertise. Indeed, OSHA regulates a nearby competitor, Harwood Chemical, which produces a product similar to Austin Black, and coking plants handling a similar type of coal (Tr. 101-103). Consequently, I do not find this factor to tilt the scales one way or the other.

During the hearing and in its post-hearing brief, the Secretary also expressed the view that the mere engagement of a business enterprise in any of the mechanical functions, i.e., "processes" listed in the Interagency Agreement under the heading

"milling," automatically stamped the firm as a coal mine operator. Thus, Inspector Blevins testified that: If you "process coal, then it comes under the jurisdiction of MSHA" (Tr. 56). The Secretary, in opening argument, again took the position that all that need be shown is that "there is a processing of coal," i.e., that it is mixed, crushed, sized, or pulverized. This contention is found to be without merit.

There is no question but that VenBlack performs several of the listed processes on coal incidental to its business purpose of converting it, by unique mechanical means from the select, highly prepared raw material it purchases from the coal industry to its final commercial product which is considered a chemical additive in the tire and rubber industry. However, the InterAgency Agreement provides a prerequisite characteristic to any listed process being considered "milling," i.e., that such process bring about "separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." (Thus, under the Agreement, "mining" is not a general engineering or industrial term, but is instead vested with a specific meaning.) Such is clearly not the case with respect to VenBlack's machine, the unique air mill grinding process described herein above (Footnote.5) which pulverizes but does not "separate" desired constituents from contaminants. Any such "separation" has previously taken place in the coal preparation plants, VenBlack's suppliers. It is manifest from the portion of the Agreement quoted above that while processes such as crushing, pulverizing, sizing, and storing, can be milling, they are not as the Secretary contends, automatically milling and thus in the regulatory domain of MSHA.

It is ultimately concluded that VenBlack is engaged in manufacturing operations and that the position of the Secretary that VenBlack is a secondary coal preparation facility is not meritorious. The Federal Mine Safety and Health Review Commission noted in its decision in *Oliver M. Elam, Jr.*, 4 FMSHRC 5 (1982) that the 1977 Mine Act's definition of "coal preparation" was taken from section 3(i) of the 1969 Coal Act, 30 U.S.C. 802(i) (1976), which definition in turn was updated from the 1952 Coal Act. The Commission stated:

"Although the legislative history of the 1969 Coal Act sheds no light on the reasons for the 1969 Act's modification of the 1952 Act's definition, we find it significant that the types of activities comprising 'the work of preparing the coal' have consistently been categorized as 'work . . . 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."

(Emphasis added.)

Any incisive inquiry into the "nature" of VenBlack's operation seemingly must resolve the fundamental question of whether it is producing coal--in this instance through the process of milling it or "preparing" it--or is manufacturing a separate, distinguishable product.

Three preliminary observations concerning VenBlack and its product serve to shed some light on this question. First, although the Secretary with some creativity contends that VenBlack is a "secondary" coal preparation facility, it is established in the record that the coal pieces purchased by VenBlack for its manufacturing purposes have already been carefully and extensively prepared (by breaking, crushing, sizing, cleaning, washing, drying and mixing to an exact specification), having first been carefully selected for its chemical composition. Secondly, it is noted that VenBlack's operation is two steps removed from the coal mine operations which extracted the coal, and one step removed from the remarkably detailed process at a preparation facility. Finally, after going through VenBlack's pulverizing process, this raw material has lost its "mineral" identity as coal, having become a separate, distinguishable product having an entirely different identity and commercial purpose --as an additive and filler from the already refined mineral raw material unloaded by Sullivan. Other than from the exercise of tracing its origin, it no longer is identifiable as coal. (Footnote.6)

VenBlack clearly does not "produce coal," in the sense that a mill, preparation plant, or commonly-perceived, "classic" coal mine operator does. An interesting case for comparison is *Secretary v. Alexander Brothers, Inc.*, 4 FMSHRC 541 (1982) wherein the Commission, in finding Alexander Brothers to be a coal preparation facility, pointed out that Alexander Brothers (which was engaged in reclamation activities) did not dispute that it undertook its processes (crushing, sizing, storing, crushing, etc.) in order to make coal-bearing refuse marketable "as coal." In contrast, it is clear that VenBlack undertakes its manufacturing processes in order to make already extracted, already prepared, coal pieces into a distinct and unique product for marketing as a chemical additive-not as coal.

As the United States Court of Appeals for the District of Columbia Circuit points out in *Carolina Stalite*, supra, every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h); the jurisdictional line rests upon the distinction between milling and preparation, on the one hand, and manufacturing on the other; classification as the former carries with it Mine Act coverage; classification as the latter results in Occupational Safety and Health Act regulation.

Superficially, *Carolina Stalite* seems to support the Secretary's position since the slate and gravel processing facility owned and operated by the company was found to be a "mine". However, close examination of the Court's decision therein raises various grounds for differentiation between *Carolina Stalite*'s business operation and that of VenBlack. *Carolina Stalite*'s "slate gravel processing facility" was situated on property in North Carolina immediately adjacent to a quarry owned and operated by another independent corporation, Young Stone Company. Approximately 30% of the stone quarried by Young was delivered to *Carolina Stalite* by means of conveyor systems owned, operated and maintained by Young which was regulated by MSHA. *Carolina Stalite* then "bloomed" the slate in a rotary kiln with intense heat, creating a light-weight material called "stalite" (its unregistered trade name) which was then crushed and sized and sold by *Carolina Stalite* for use in making concrete masonry blocks. In disagreeing with the Commission's conclusion that *Carolina Stalite* was engaged in manufacturing rather than mining (Footnote.7) the Court delivered the primary thrust of its rationale in the following language:

Were we governed by ordinary English usage, we might well agree with the Commission. Carolina Stalite does not extract the slate it processes and, as the Commission said, its facility cannot be considered a "mine in the classic sense." However, neither does Carolina Stalite manufacture concrete masonry blocks, the primary end use for stalite, and it is by no means perverse to characterize the Stalite facility as a mine. The physical proximity and operational integration of Carolina Stalite and Young Stone, whose plant is unquestionably subject to the Act, permit those facilities to be viewed, in industrial and economic reality, as distinct from questions of legal title to the premises, as a unified mineral processing operation. That consideration makes less artificial the statute's clear classification of Carolina Stalite's facility as a mine." (Emphasis added)

By comparison, VenBlack can in no sense be viewed as "a unified mineral processing operation" with the operators who extract its coal from the ground. Nor can it similarly be viewed as unified mineral processing operation with the coal preparation plants which thereafter prepared its coal.

The following chart to some extent depicts the distinguishing features distinguishing VenBlack from Carolina Stalite.

CAROLINA STALITE

1. Extraction: Carolina Stalite and Young Stone Company are seen as a "unified" slate gravel processing facility with physically contiguous premises with Young doing the extracting and delivery to Stalite, which mills the original mineral. Young is already regulated by MSHA.
2. Delivery: Carolina Stalite's unrefined mineral is delivered to it for processing by Young's conveyors as part of a unified, integrated slate gravel operation.
3. Process Performed
on the Mineral: Heat expansion, crushing, and sizing.
4. Identity of original
Mineral after Processing: Essentially the same as the original mineral extracted.
5. End use of Product: Stalite is used in the manufacture of concrete blocks.

VENBLACK

1. Extraction: VenBlack is not unified, physically contiguous, or operationally integrated with any mine operator engaged in extraction whether or not such is regulated by MSHA. After extraction, the original mineral is subjected to exhaustive preparation by
2. Independently owned and Operated Preparation Plants: VenBlack is not unified, physically contiguous, or operationally integrated with any mine operator engaged in mineral preparation whether or not such is regulated by MSHA.
3. Delivery: VenBlack's highly-prepared mineral raw material is delivered to it by an independent hauler.
4. Process Performed on Original Mineral: Sampling for chemical composition, storage, sizing (by crushing), pulverizing, and bagging.
5. Identity of Original Mineral after processing: Austin Black is no longer coal, having become a separate chemical product.
6. End use of Product: As a chemical additive and filler in the tire and rubber industry. (Footnote.8)

The Court in Carolina Stalite made a final point with respect to the determination of covered mine activity which must be considered:

"Because the Act was intended to establish a "single mine safety and health law, applicable to all mining activity," S.Rep No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added), its jurisdictional bases were expanded accordingly to reach not only the "areas . . . from which minerals are extracted," but also the "structures . . . which are used or are to be used in . . . the preparation of the extracted minerals." S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), U.S.Code Cong. & Admin.News 1977, 3401, 3414. See also S.Rep. No.

461. supra, at 38 (the bill "broadly defined mine to include . . . all surface facilities used in preparing or processing the minerals"). Section 3(h) thus "contains amendments to the definitions in the [predecessor statute] which reflect . . . the broader jurisdiction of th[e] Act. " S.Rep. No. 181 supra, at 14, U.S.Code Cong. & Admin.News 1978, at 3414."

The question thus remains whether VenBlack's surface facilities and structures are used in preparing or processing minerals. It is concluded that inherent in the determination that a process is "preparing" or "processing" (milling) minerals is the proposition that at the end of the preparation or processing there must still remain a distinguishable mineral left for marketing and sale as such mineral. This is one of the salient factors differentiating manufacturing from milling/preparing. If the mineral substantially loses its original identity in such process or preparation and a separate, unique, clearly identifiable product emerges for sale and marketing, then it would seem that the operation involved is manufacturing rather than mining. In other words, the nature of the business operation must be discerned and the retention of mineral identity at the end of the processing is necessary to the conclusion that the operation is engaged in mineral preparation or mineral milling. Otherwise, the mere performance of any of the mechanical processes listed in the InterAgency Agreement on any mineral would "automatically" be construed as mining activity rather than manufacturing.

Here, it is clear that VenBlack is not an integral part of a unified extraction/mineral processing operation the extraction part of which is already regulated by MSHA; the "convenience of administration" factor does not weigh against either MSHA or OSHA regulation; the original mineral processed by VenBlack has, upon completion of such process, lost its original identity and, in economic reality, given way to a new product.

This proceeding involves difficult issues and the positions of the parties both have some merit in the present stage of the development of the law on the subject. The Congressional mandate to generously extend MSHA's jurisdiction over questionable enterprises is clear. Old Dominion Power Company, 6 FMSHRC 1886 (1984), at 1890. Nevertheless, accepting the Secretary's own jurisdictional guidelines and upon careful consideration of the nature of VenBlack's operation and other relevant determinants, I have concluded that it is engaged in manufacturing a separate chemical product rather than producing (milling or preparation) coal. The position advanced by VenBlack is accepted as having the greater merit.

manufacturing cycle."

~Footnote_five

5 Although referred to as a "grinding" process, the unique machine which performs this operation more precisely "pulverizes" the raw material-as that term is defined in the InterAgency Agreement-since the product emerges with the consistency of a fine powder.

~Footnote_six

6 These are three of the bases upon which it is concluded that the VenBlack operation is to be distinguished from the "slate gravel processing facility" found to be a mine in *Donovan v. Carolina Stalite Company*, 734 F.2 1547 (D.C.Cir., 1984), which is discussed further subsequently.

~Footnote_seven

7 The Court determined that the Commission had incorrectly held that the Act required a company actually to extract a mineral before being subject to Mine Act jurisdiction.

~Footnote_eight

8 It might be said of stalite's relationship to the original mineral that "a rose is a rose by any other name," whereas Austin Black has become perfume.