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LITTLE SANDY COAL SALES v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LITTLE SANDY COAL SALES, INC.,	CONTEST PROCEEDING
CONTESTANT	Docket No. KENT 83-178-R
v.	Order No. 2053590; 3/18/83
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	No. 1 Tipple
RESPONDENT	

DECISION

Appearances: Edgar B. Everman, Little Sandy Coal Sales, Inc., Grayson, Kentucky, for Contestant; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Melick

This case is before me on remand from the Federal Mine Safety and Health Review Commission by decision dated March 28, 1985. De novo hearings were thereafter held on May 21, 1985 on the Contest filed by Little Sandy Coal Sales, Inc. (Little Sandy) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." Little Sandy challenges the issuance by the Federal Mine Safety and Health Administration (MSHA) of a withdrawal order on March 18, 1983, pursuant to 104(b) of the Act. (Footnote.1)

The general issues before me are whether Little Sandy's coal processing facility is a "mine" within the meaning of section 3(h)(1) of the Act, and if so whether the order at bar is valid.

The essential facts are not in dispute. During relevant times Little Sandy's operation consisted of a scale, scale house, parts and lubricant storage trailer and a raw coal processing apparatus. The processing apparatus consisted of a raw coal hopper, raw coal feeder and belt, a crusher with a load-out belt and a screening unit. The plant is located on approximately 1-1/4 acres and the coal stockpile area on approximately 3/4 of an acre. The processing apparatus is about 100 feet long and is powered by a 440 volt commercial power unit and a diesel motor.

During relevant times raw coal was purchased from several local mines and was custom processed into (1) crusher coal, (2) stoker coal, and (3) fine coal or carbon. The stoker coal was further sized depending on customer demands--one size for household use in stoker stoves and another for commercial use. 25 to 30 percent of the processed coal was prepared for local residents for household use and 70 to 75 percent for commercial users such as the local county school systems and Morehead State University. The processing plant is depicted in photographs marked as government exhibits 1 a, b, and c, and 2 a, b, and c.

Included within the definition of the term "mine" under section 3(h)(1) of the Act, are facilities used in the "work of preparing coal." (Footnote.2) The phrase "work of preparing coal" is defined in section 3(i) of the Act as: "[t]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite or anthracite and such other work of preparing such coal as is usually done by the operator of the coal mine."

This and other criteria for determining whether a coal handling operation is engaged in "work of preparing coal" were recently reviewed by the Commission in Secretary v. Mineral Coal Sales, Inc., 7 FMSHRC ---- (May 16, 1985):

In Elam, [Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (1982)], the Commission held that under the statutory definition the mere fact that some of the work activities listed in section 3(i) are performed at a facility is not solely determinative of whether the facility properly is classified as a "mine". Rather:

> [I]nherent 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 activities, but also into the nature of the operation performing such activities....
>
> ... [A]s used in section 3(h) and as defined in section 3(i), "work of preparing [the] 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.

4 FMSHRC at 7, 8 (emphasis in original). In Elam the Commission held that a commercial loading dock that loaded coal, in addition to other materials, was not a "mine". The Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading, business and not to meet customer's specifications or to render the coal fit for any particular use.

The Commission followed Elam in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), a case arising under the 1969 Coal Act, 30 U.S.C. 801 et seq. (1976) (amended 1977). We concluded that an operation that extracted materials from a waste dump and separated coal from the refuse in order to market the coal was engaged in coal preparation. Accord: Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 591-92 (3rd Cir.1979) (a facility that separated coal fuel from material dredged from a river bottom by another entity was engaged in coal preparation under the Mine Act). The Commission has also emphasized that a preparation or milling facility need not have a connection with the extractor of the mineral in order to

be subject to coverage of the Mine Act. Carolina Stalite Co., 6 FMSHRC 2518, 2519 (November 1984); Alexander Brothers, Inc., 4 FMSHRC at 544.

Applying these considerations to the case at bar it is clear that the business engaged in at Little Sandy constitutes "mining" under the Act. At this facility coal was stored, mixed, crushed, sized, and loaded--all activities included within the statutory definition of coal preparation. In addition the nature of the Little Sandy operation was such that, unlike the commercial loading dock in Elam at which coal was crushed merely to facilitate loading and transportation on barges, all of the above listed work activities were performed to make it "suitable for a particular use or to meet market specifications." Thus, Little Sandy was a "mine" under the Act and MSHA properly asserted its inspection authority over the facility. Secretary v. Mineral Coal Sales Inc., supra. (Footnote.3)

The evidence is also undisputed that when first cited on March 10, 1983, for having inadequate sanitary toilet facilities, Little Sandy in fact had no such facilities. (Footnote.4) In addition it is undisputed that when the inspection team returned on March 18, 1983 to determine whether abatement had been completed, Edgar Everman, president of Little Sandy, indicated that not only did he not have an approved toilet facility but that he "did not intend to put one there". Citation Number 2053613 issued for failing to have an approved sanitary toilet under 30 C.F.R. 71.500 was therefore valid

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and the subsequent section 104(b) withdrawal order (number 2053590) issued March 18, 1983, for failure to abate under the circumstances was properly issued. Accordingly that order is affirmed and the contest of that order is denied.

Gary Melick
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1. Section 104(b) of the Act reads as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

~Footnote_two

2. Section 3(h)(1) of the Act states, in relevant part, as follows:

> "Coal or other mine" means ... (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... used in ... or to be used in ... the work of preparing coal or other minerals, and includes custom coal preparation facilities.

~Footnote_three

3. I have not ignored Little Sandy's contention that its coal processing operation is not considered to be a "mine" under various Kentucky laws and under the Federal Surface Mining and Reclaimation Act. However, disposition of this case is governed solely by the separate and distinct provisions of the Federal Mine Safety and Health Act of 1977. Little Sandy has also expressed concern that consideration had not been given to the fact that it is a small operator. As explained at hearing the size of the mine operator and the effect any monetary penalty would have on the operator's ability to stay in business are factors that must be considered by the Commission Judges in assessing civil penalties for violations under the Act. See section 110(i) of the Act.

~Footnote_four

4. An MSHA inspector had also cited eleven other violations on this date but for purposes of litigating the jurisdictional issue discussed supra, MSHA selected this citation and the subsequent "no area affected" withdrawal order for failure to abate that citation.