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MARION DOCKS V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

MARION DOCKS, INC.,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 88-169-R
Order No. 2896051; 3/1/88

Docket No. WEVA 88-170-R
Citation No. 2896052; 3/1/88

Docket No. WEVA 88-171-R
Citation No. 2896053; 3/1/88

Docket No. WEVA 88-172-R
Order No. 2896054; 3/1/88

Docket No. WEVA 88-173-R
Order No. 2896055; 3/1/88

Docket No. WEVA 88-174-R
Order No. 2896056; 3/1/88

Docket No. WEVA 88-175-R
Order no. 2896057; 3/1/88

No. 1 Mine
Mine ID 46Ä06904

DECISIONS

Appearances: W. Henry Lawrence IV, Esq., Steptoe & Johnson,
Clarksburg, West Virginia, for the Contestant;
Joseph T. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern Notices of Contest filed by the
contestant pursuant to section 105(d) of the Federal Mine Safety
and Health Act of 1977, challenging the legality of the

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captioned citations and orders issued pursuant to the Act. The contestant takes the position that its Marion Docks loading facility is not a mine within the statutory definition of that term as found in 30 U.S.C. 802(h)(1). The record reflects that the contestant did not contest or seek review of the civil penalty assessments made by MSHA with respect to the contested citations and orders. Contestant's counsel confirmed that the contests which are the subject of these proceedings are based on the contestant's jurisdictional arguments, and assuming an adverse decision with respect to this issue, counsel confirmed that the contestant will pay the proposed civil penalty assessments and will not contest the fact of each violation or the amounts of the civil penalty assessments (Tr. 5Ä7).

The respondent filed timely answers to the contests, and it takes the position that the loading facility in question is a mine within the statutory definition at 30 U.S.C. 802(h)(1), and that the contestant is subject to MSHA's enforcement jurisdiction. A hearing was conducted in Fairmont, West Virginia, and the contestant has filed posthearing arguments in support of its jurisdictional position. The respondent filed no posthearing brief, and relies on its pretrial jurisdictional arguments filed in its Memorandum in response to the contestant's motion for summary decision, which I previously denied. I have considered all of the arguments made by the parties in these proceedings, including those made on the record during the course of the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issue

The issue presented in these proceedings is whether or not the contestant's Marion Docks loading facility is a mine subject to MSHA's inspection and enforcement jurisdiction.

Discussion

The contested citations and orders, which include "significant and substantial" (S & S) findings, were all issued by MSHA Inspector Homer W. Delovich during the course of an inspection which he conducted on March 1, 1988, and they are as follows:

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Section 104(d)(2) Order No. 2896051 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.1102(d), and the condition or practice is described as follows:

At the diesel fuel tank storage, coal and coal dust was accumulated and completely covered up the backside of the 12 foot tank to the top and halfway up both ends. Condition of the tank was due to the coal storage pile loaded too high and against the tank. Presents a fire hazard and hazard to the workmen when walking and putting fuel in the tank. Tom Visnans, foreman of this shift, and tank stored next to the office and weight house where (sic) readily visible and condition has existed for a period of time. No one working to clean around the tank when observed. Tank holds 400 to 500 gallons of fuel.

Section 104(a) Citation No. 2896052 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.1104, and the condition or practice is described as follows: "Combustible materials of grease, oil and coal are accumulated on the frame, motor housing inside, radiator and sides of the Beckwith 966 Front End Loader. Tom Visnans foreman."

Section 104(a) Citation No. 2896053 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.1104, and the condition or practice is described as follows: "Combustible materials of grease, oil and coal dust were accumulated in the frame, motor housing inside, radiator and sides of the 980 Front End Loader. Tom Visnans, foreman."

Section 104(d)(2) Order No. 2896054, cites an alleged violation of mandatory safety standard 30 C.F.R. 77.205(b), and the condition or practice is described as follows:

The walking platform at the outer side and front of the slate picker's platform and at the bottom of the ladder landing to the crusher platform and area of between the two ladders were obstructed by coal spillage accumulations over the toe boards of approximately 12 to 18 inches in height across the walkway platforms. For a distance of 15 feet at the slate picker's platform and 8 feet at the crusher platform. Conditions present a trip and stumble hazard. Rick Love-slate picker laborer and Tom Visnans foreman.

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Section 104(d)(2) Order No. 2896055 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.1104, and the condition or practice is described as follows:

Combustible materials of oil, grease and coal dust were accumulated and caked on the front, back and sides of the 4 foot x 6 1/2 foot crusher housing and coal dust was covering the floor of the platform housing the crusher. Tom Visnans, foreman. Conditions present an ignition and fire hazard.

Section 104(d)(2) Order No. 2896056 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.205(b), and the condition or practice is described as follows:

The elevated stacker belt ramp walkway was obstructed at the entrance by piles of coal, accumulation of coal approximately 2 feet high on the ramp at the entrance for approximately 9 feet and coal lumps inby up the ramp to the top. Condition presents a stumbling and tripping hazard. Tom Visnans, foreman.

Section 104(d)(2) Order No. 2896057 cites an alleged violation of mandatory safety standard 30 C.F.R. 77.202, and the condition or practice is described as follows:

The roller drum and bottom belt for approximately 5 feet were turning and running in accumulations of coal dust, the roller drum and pillar bearings were completely engulfed in coal dust. Condition presents an ignition and fire hazard. Tom Visnans, foreman. Conditions of coal and coal dust were at the roller drum and bottom belt of the Stacker Belt.

Respondent's Testimony and Evidence

MSHA Inspector Homer W. Delovich confirmed that he conducted an inspection of the contestant's dock facility on March 1, 1988, and that this was his first inspection there. However, from a review of MSHA's "mine profile," which includes information concerning past violations, respirable dust and noise sampling, training, and the mine legal identification information, he learned that the facility had previously been inspected by MSHA twice a year since 1985 (Tr. 17Ä22, exhibits RÄ1 through RÄ3). Mr. Delovich confirmed that the Mine ID

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information reflects that the facility is a coal or barge loading facility, and he described the operation as follows at (Tr. 22Ä23):

Q. Well, coal/barge loading facility. What do they do there, do you know?

A. Yes, sir. They load coal, they weigh it, they blend it, they crush it, and they convey it into barges, across the road to the river. They have two draw-off tunnels that we inspect.

Q. I'm sorry. That was two draw-off what, sir?

A. Draw-off tunnels underneath the coal bins when they dump it which we inspect for methane and stuff. We have three conveyor belts. We have a crusher. We have a weight house. We have two endloaders there and, plus, we have the fuel tanks and scale house.

Q. When you conducted your inspection, did you have a chance to observe the operation?

A. Yes, sir.

Q. How is the operation performed from the time the coal comes in, do you know?

A. The coal is brought in by a truck and weighed at the scale house. That is where the foreman has his office. Then it is taken either -- if they are dumping into the barges, it is taken to the barges by dumping into the coal bin. That is if they have barges available to load. If they don't, then they stock the coal in a pile and blend it that way.

Mr. Delovich stated that he has observed coal being cleaned and crushed, and through conversations with superintendent Frank Miller, Mr. Sorbello, Mr. Bealko, and Mr. John Markovich, he learned that coal was also blended at the facility. Mr. Delovich explained that Mr. Sorbello, Mr. Bealko, and presumably Mr. Miller, buy coal, and also produce coal from mines which they own and operate. He identified them as the Deconder Mine, M & J Coal, Wasco Fuels, and a new mine which he identified as the Manley Mine, and confirmed that they are all located in West Virginia (Tr. 25). Mr. Delovich

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stated that he met Mr. Miller, Mr. Sorbello, and Mr. Bealko through his inspections at the M & J Coal Company. He also stated that the coal produced at these mines is brought out of the mines by conveyor belts, dumped and loaded onto trucks, and then transported to the contestant's loading facility.

Mr. Delovich stated that he has inspected three other coal mines which sell or contract coal from the Sewickley and Pittsburgh seams to Mr. Sorbello, Mr. Bealko, and Mr. Miller, and he identified them as "the LaRosa Fuels on the Meredith job, the Patterson Brothers, and Thompson, the river mine" (Tr. 27). Mr. Delovich explained that the Sewickley coal is high in ash and "dirtier coal," and that the Pittsburgh coal "is probably the best Pittsburgh coal in the United States as far as sulphur content is and the cleanliness of it" (Tr. 27). In order to fill its orders, and to keep the coal below a certain ash content, Mr. Delovich believed that the contestant blended the Pittsburgh low sulphur coal with the Sewickley coal, and he confirmed that he learned this through conversations with the company and other inspectors (Tr. 28).

Mr. Delovich stated that while he was present at the M & J Coal Company mine for 10 or 12 days in connection with the sealing of a mine fire area, he spoke with Mr. Sorbello, Mr. Miller, and Mr. Bealko, and they were concerned that they needed to have the mine in operation because the coal was low in sulphur and ash and they had to blend it with their other coal in order to sell it at the Marion Docks. Mr. Delovich confirmed that Mr. Miller is the superintendent at the Marion Docks facility (Tr. 29). In response to a question as to whether he had ever observed blending being done at the Marion Docks, Mr. Delovich responded as follows (Tr. 29):

A. I was talking to Frank Miller and them when we was writing their notices and the trucks was coming in, and if the truck comes in from one company and it is the type of coal they need to put in, you know, they load so much trucks from one outfit and then they loaded so much and then they dump it in there and they try to blend it. When they stock it, they probably try to blend it that way.

Q. But you saw the trucks coming in.

A. Yes, sir, I saw the trucks coming in. I didn't know where they were coming from but that is how it was done.

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Mr. Delovich confirmed that he has observed coal crushing taking place at the Marion Docks facility. He stated that crushing was required "because of the large size of coal coming through," the need to get rid of the large lumps of pyrite coal which will not sell or ruin the crusher. He described what he observed as follows (Tr. 30):

THE WITNESS: The coal is dumped in a bin and goes down in the draw-off tunnel and comes up the chute where they have a man cleaning and picking slate. Then, underneath it, it drops into a crusher and then comes out and falls onto the belt and it takes it up to another pile which goes to another draw-off tunnel and to the river barge it is conveyed to.

Mr. Delovich believed that the coal shipped from the Marion Docks facility goes to the Willow Island Electric Power Company located at Parkersburg, West Virginia, and that it is transported along the Monongahela, Allegheny, and Ohio Rivers. The power company burns the coal to furnish electrical power, and he learned that Willow Island was one of the contestant's customers through conversations with Mr. Miller and Mr. Bealko. In addition, one of the employees, John Martin, advised him that Willow Island had returned some barges of coal "because of dirty coal and that at that time that is why they had to watch how they blended their coal" (Tr. 31). He also learned this from another company who sells coal to the electrical company (Tr. 32).

Mr. Delovich stated that he observed two endloaders, two draw-off tunnels, and three conveyor belts at the Marion Docks facility, and he described the function of the draw-off tunnels as follows (Tr. 32-33):

THE WITNESS: Well, we dump coal into a bin on the first draw-off tunnel and it goes down underneath the ground. Then the belt is down there and it dumps onto the belt and it comes up where the slate picker is and then it drops into the crusher and then the crusher drops it out onto a little conveyor belt that takes it up and drops it into a pile and then they push it into a draw-off tunnel -- again, another one in which goes over across the road and to the river to the barges.

In clarifying his previous testimony that some of the coal transported to the facility is trucked and dumped directly

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into a barge if it were readily available for loading, or stockpiled if there was no barge available, (Tr. 24), Mr. Delovich again confirmed that this was the case, but explained that "they don't dump it in the barge. They dump it into the coal chutes . . ." (Tr. 34). When again asked whether the coal is taken directly to the barge, he replied as follows at (Tr. 34-35):

THE WITNESS: With the truck. It is taken to there and then -- well, I don't know how they determine which coal they are blending. Now, of course, if it comes from one mine, I know we have two trucks coming out of M & J Coal and I have talked to those men. When I talked to the truck drivers there up at the mine, the M & J, they told me they needed the coal real bad. And, Mr. Markovich told me he has got to mine coal so that they can blend it or they can't sell their coal.

Mr. Delovich identified a copy of the MSHA Mine Identification Number (ID), assigned to the M & J Coal Company, and confirmed that it is part of the mine profile maintained in MSHA's records for that mine (exhibit R4, Tr. 37-38). He confirmed that Charles Sorbello is listed as the President of M & J Coal Company, and that he is also shown as the Secretary-Treasurer of Marion Docks in MSHA's legal identification file (Tr. 38, exhibit R1).

Mr. Delovich confirmed that he has previously inspected the M & J Mine, and he estimated that it is 5 miles from the Marion Docks facility. He confirmed that it is still operational, and was operational at the time he inspected Marion Docks in March, 1988 (Tr. 40). He also confirmed that Marion Docks has never previously questioned MSHA's jurisdiction to inspect its facility (Tr. 41). In addition to the M & J Mine, Mr. Delovich believed that Mr. Sorbello has an ownership interest in the No. 2 Williams Mine, which he understands leases the mine to the "DeConder brothers," who sell the coal to Mr. Sorbello. Mr. Delovich also believed that Mr. Sorbello has an ownership interest in the Wasco Mine, which reclaims gob coal through a tipple and ships it to Marion Docks (Tr. 42-43). Mr. Delovich did not believe that Wasco Coal was controlled by Marion Docks, but that Mr. Sorbello is an officer in both companies (Tr. 45). Mr. Delovich later stated that he has no knowledge that Wasco, which is also known as Wash Fossil Fuels, actually ships coal to Marion Docks, but that the Williams and M & J mines do (Tr. 47).

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Mr. Delovich stated that in his prior conversations with Marion Docks superintendent Miller concerning MSHA's enforcement jurisdiction, questions were raised about two other dock loading facilities across the river, and he identified them as the Seccuro and Agerwald facilities. Mr. Delovich stated that Seccuro loads gravel and is under OSHA jurisdiction, and that Agerwald was conducting "test trial runs" at its loading facility to determine whether it was working properly (Tr. 41).

On cross-examination, Mr. Delovich confirmed that there are three other loading facilities operating in the vicinity of Marion Docks, and he identified them as Seccuro, Agerwald, and Preston Energy. He stated that Seccuro is the only one which has not been inspected by MSHA. He explained that although Seccuro loads coal at its dock, it also loads gravel, and that MSHA's legal identification information for that facility reflects that it is under OSHA enforcement jurisdiction and is inspected by that agency and not by MSHA (Tr. 49). Although Seccuro has one conveyor belt and one loading bin for loading coal on barges, since it also loads other rock minerals, the jurisdictional interpretation communicated to him (Delovich), is that Seccuro is subject to OSHA, rather than MSHA, jurisdiction (Tr. 50). Mr. Delovich confirmed that he has never inspected the Seccuro facility, although he has visited the site to observe the operation, and he stated that "from what I understand, they load rock too. I have no jurisdiction" (Tr. 50).

With regard to the Agerwald loading facility, Mr. Delovich stated that when he visited that site to conduct an inspection, he was informed that coal was being loaded "for a trial run." Upon return to his office after that visit, Mr. Delovich stated that Agerwald apparently called the MSHA district office, and that office advised him (Delovich) that "they said something about a trial run and that he was not under our jurisdiction and that in all probability he wouldn't be under our jurisdiction because he did not fit into the guidelines of what a barge loading facility would be" (Tr. 52). When asked about any MSHA guidelines concerning jurisdiction, Mr. Delovich responded "If they are loading other things such as rock or anything or don't own a mine" (Tr. 52). He confirmed that the Marion Docks facility loads only coal, while Agerwald loads coal, rock, and lime, and other minerals. When asked whether the kinds of minerals which are loaded is the determining factor as to whether OSHA or MSHA jurisdiction applies, Mr. Delovich responded ". . . it is not for me to determine. I question it too" (Tr. 53). He also stated that ". . . we are told that if they size the coal, blend the coal or clean the coal--that is under our jurisdiction" (Tr. 54).

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In response to a bench inquiry of MSHA's counsel as to any applicable MSHA guidelines for determining jurisdiction, counsel responded as follows (Tr. 53):

MR. CRAWFORD: No, there were no guidelines other than the case law, Your Honor, but it has been my understanding that because there were other facilities and they were loading lime and other materials, it was felt that they didn't fall under the jurisdiction, plus they were not treating in the same manner.

Mr. Delovich stated that it was his understanding that MSHA Inspector Ron Myer was dispatched to the Agerwald loading facility to obtain the information for a determination of jurisdiction, and that the information was taken back to the MSHA district office for a determination by district manager Ron Keaton (Tr. 55). Mr. Delovich confirmed that he has never discussed the Marion Docks case with Mr. Keaton, and that he did not report the fact that Marion Docks was loading coal to Mr. Keaton. Mr. Delovich did not know who may have made such a report. Mr. Delovich identified his supervisor as Steve Kuretza, from MSHA's Fairmont field office, and confirmed that he has never discussed the jurisdictional question concerning Marion Docks with Mr. Kuretza (Tr. 57). He also confirmed that he has never seen a copy of a March 9, 1988, letter from Marion Docks counsel Lawrence to Mr. Kuretza questioning MSHA's enforcement jurisdiction (Tr. 57). Mr. Delovich stated that since the issuance of the contested orders of March 1, 1988, he has inspected the Marion Docks facility for respirable dust compliance and has done so as part of his regular inspection assignments by Mr. Kuretza (Tr. 58).

Mr. Delovich could not identify by name the trucking companies which have transported coal to the Marion Docks facility, and he surmised that they were independent trucking companies. He confirmed that he has inspected these trucks for brakes and back-up horns once they enter the Marion Docks property, but has no jurisdiction to inspect them while on the highway in transit (Tr. 60). He also confirmed that MSHA has inspected Marion Docks since it first started its operation in 1985, and that the mine ID information for the facility was filed with MSHA by Marion Docks. Marion Docks also filed its training program information with MSHA (Tr. 61-62).

Contestant's Testimony and Evidence

Kevin J. Bealko, President, Marion Docks, testified that his company is a coal loading facility which was constructed "to tipple coal for various producers here in Marion County because the main reason being that the B & O Railroad was putting us out of business up here and we wanted to get on the river and stay active in the coal fields" (Tr. 74). He confirmed that the corporate officers consist of himself as president and one-third owner, and co-owners Charles Sorbello and Frank Miller. He stated that the dock is used solely as a means of accommodating 15 different mine operators that haul coal to the facility for the purpose of selling it. Marion Docks does not take title to the coal, has no direct sales contracts with any of the utility companies, and all of the sales are handled through brokers. Marion Docks owns no coal mines or coal reserves, conducts no mining operations, and has no connection with any mines. Its sole occupation is that of a dock facility (Tr. 75-76).

Mr. Bealko stated that Marion Docks does not purchase the coal that is shipped to the dock by the producers, but does have an "agent account" whereby brokers act as agents for Marion Docks for the purpose of handling the coal for the utility customers who purchase it from the brokers. Marion Docks has no direct sales contracts with any utility customers, but it does have sales agreements with brokers who in turn have utility sales contracts. In further explanation of these broker-customer arrangements, Mr. Bealko stated as follows (Tr. 76-77):

Q. Okay. So, then is it correct that the broker has the contract with the utility or with the customer, the ultimate customer?

A. Right, correct. They order up our barges and they tell us what spec as you have to hit in any coal that you load at any place, whether you are Consol or little Marion Docks. You have to hit a certain specification. That may be size or that may be ash or that may be sulphur or it may be all three. Our brokers notify us when the barges are coming and what specification we have to meet on those barges, as anyone does, like Consol or Island Creek or Peabody or no matter who you are, or Seccuro or Agerwald. They have got a spec they have to hit. That is just the nature of the coal business. You just don't load a coal from a

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particular job that hits that spec. It is a spec that may fit one job but when you are loading three different types of orders that we have, you have got to do it over a period of 15 jobs to make it all work through the course of a month.

Mr. Bealko confirmed that upon arrival of the coal at its site, it is weighed, and if it is oversized and does not meet the broker's specifications, it is processed and crushed through belt hoppers and bar grizzlies that take out all of the coal fines. Approximately 10 percent of the larger coal of more than 4 inches goes to picking tables and crushers. He confirmed that the larger coal sizes cannot pass through the tipple or the bucket unloaders at the utility power plants, and that the utilities do not like any coal sized larger than "four by zero" (Tr. 78).

Mr. Bealko also confirmed that his facility receives coal which is already sized at "four by zero." This coal, which amounts to 10 percent of each load, is taken directly to the surge hopper without crushing, and is dumped into the barges by means of conveyor belts. The coal under 4 inches never crosses the picking table or the crusher (Tr. 79). No coal washing or cleaning takes place, and only 4 percent of the coal ever "gets picked" at the picking table, and most of it goes to the crusher (Tr. 80).

Mr. Bealko stated that his facility uses equipment such as belt conveyors and front-end loaders, but it does not have cyclones, washer plants, or scalpers to remove different pyritic impurities, and he described the equipment which is used as follows (Tr. 80-81):

A. We have two high-lifts. We have the facility itself which is two bins that goes onto a belt that goes up to this bar grizzly that takes the fines away and that goes up to a radial stacker that drops into this surge hopper that goes over to the barges. The other part is the product that doesn't cross the grizzly that goes on to the picking table and goes into the crusher and at that point it winds up on the radial stacker and it goes up into the stockpile to the surge hopper that goes into the barges.

Mr. Bealko confirmed that his company does not own the barges that transport the coal from his facility, or the

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trucks that haul coal to the site. The truckers are independent contractors who "order up their trucks depending on what coal they have to haul" (Tr. 82). With regard to the inspector's reference to the Willow Island power plant, Mr. Bealko denied that his company has ever shipped coal to that utility. He confirmed that it does load coal for the Pleasants power plant, and other plants as determined by the coal brokers (Tr. 83).

Mr. Bealko confirmed that Mr. Sorbello owns one-half of the M & J Coal Company, a deep coal mine producing low sulphur coal, and that the majority of that coal comes to Marion Docks, and constitutes one-sixth of all coal production that comes to the dock from all mines. Mr. Markovich is also an owner of that mine. Mr. Bealko stated that he and Mr. Miller have no ownership interest in any coal mines, either as stockholders or corporate officers (Tr. 84).

Mr. Bealko stated that prior to the design and construction of the Marion Docks facility, he operated tipples on the B & O railroad. The Bell Mining Company and other coal companies loaded coal at that facility, and he was aware of the fact that since coal was tipped at this facility, it was subject to MSHA's jurisdiction. Since his Marion Docks plant was the "same type of plant" as Bell Mining Company, and since MSHA inspectors advised him that Marion Docks would be inspected when it became operational, he took great pains to insure that his facility would be approved by MSHA and stay in compliance with MSHA's safety requirements. For these reasons, he filed for an MSHA mine ID number and operated for 2 1/2 years loading coal and being inspected by MSHA. However, when he learned from MSHA inspectors that three other docking facilities in his area who operated facilities similar to his were not being inspected by MSHA, he then began to question MSHA's jurisdiction over his facility because "our identity and our dock is no different from any identity over any of the other docks up in our area (Tr. 85-86).

Mr. Bealko indicated that with the exception of the Securo Dock, which also loads stone, the other docks do precisely what his does. He stated that the R.P. Agerwald Dock only crushes and loads coal from independent coal producers, and "comingles it to hit certain specs just like we have to do, and he puts it in barges which are ordered up from brokers just like we have to do" (Tr. 87).

Mr. Bealko explained that the operator of the Agerwald Dock retained an attorney who contacted Inspector Delovich's supervisor, Mr. Kuretza. As a result of this, Inspector

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Delovich inspected the Agerwald operation and reported to Mr. Kuretza "that there were many problems with that facility as far as coming under MSHA to be approved, and Mr. Kuretza said, hey, leave it alone; we got a phone call from their attorney that says they are not under our jurisdiction, they are under OSHA, which I know is not pertinent to our situation but maybe it is because he is right across the river from us tippling coal just like we are" (Tr. 89).

On cross-examination, Mr. Bealko stated that the coal broker is the customer who provides the coal specifications to Marion Docks, and Marion Docks provides the coal according to those specifications. He confirmed that Marion Docks has never had any of the coal which it has loaded for shipment ever rejected because it did not meet the required specifications. He indicated that the "specifications" concern the size of the coal for unloading purposes, as well as the quality of the coal in terms of ash and low and high sulphur content, "as all specifications do," and that Marion Docks brings in coal to meet those specifications (Tr. 93-94).

Mr. Bealko stated that "the broker kind of orders the coal from the mine. All we do is wait for the coal to show up on the dock and then we put that coal in the barges for those producers" (Tr. 94). Marion Docks knows that the coal which is shipped meets the required specification, and it receives payment from the broker and not the utility, and the broker takes title to the coal when it is shipped from the dock. Marion Docks is aware of the locations where the coal is shipped to in accordance with the specifications from the brokers who ordered the barges, and Mr. Bealko stated that "we have to in order to, you know, hit that specification that they are calling for." The receiving plant transmits its required specifications through the broker to the coal producer, and Marion Docks handles the coal at the dock for the producer so that it meets the specifications before it leaves the dock (Tr. 95).

Mr. Bealko confirmed that Mr. Sorbello, one of his partners in Marion Docks, is the only shareholder who holds an ownership interest in the M & J Coal Company and the Bell Mining Company, a soft surface mine. Mr. Bealko also confirmed that Marion Docks accepts coal for shipment from the M & J mine, and at times from the Bell mine (Tr. 96-97).

Mr. Bealko confirmed that only 10 percent of the coal received at the Marion Docks for shipment goes to a picking table, and only 3 or 4 percent of that ever gets picked. Picking is done to prevent big rocks and roof bolts from

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accidentally reaching and ruining the crusher, or causing problems when it is off-loaded at a plant (Tr. 97). In the event the specifications call for the crushing of the coal, it is crushed by Marion Docks, but only 10 percent of the coal that reaches the picking table is crushed. The reason for the crushing is to meet a particular specification or to insure that it can be loaded in the barge and off-loaded at the plant. He further explained as follows (Tr. 99-100):

A. Well, specifications are one thing. That is an analytical point of view on moisture, ash, sulphur, BTU. Sizing is something else. That is a whole separate specification, if you want to call it. It is a sizing specification versus an analytical specification.

Q. Do you have to consider both when you load?

A. For particular orders, yes. Some yes and some no.
JUDGE KOUTRAS: Well, he has got to consider what the broker orders up, don't you?

THE WITNESS: Exactly.

JUDGE KOUTRAS: If a broker orders up all crushed coal, fines, from a customer, then you are going to have to ship it, aren't you?

THE WITNESS: Well, like I say --

JUDGE KOUTRAS: Or else reject the broker and tell the broker to find some other shipper.

THE WITNESS: Somebody else to load it, right. But most of our coal is a four by zero product for our particular plants that our coal winds up to.

JUDGE KOUTRAS: But the point is that you have to deliver and load coal that is specifically to the specifications of the customer who goes to the broker who, in turn, tells you, hey, this is the coal that has to go to customer "A" isn't that true?

THE WITNESS: Correct.

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Mr. Bealko confirmed that Marion Docks ships coal from 15 different coal producers who truck coal to the facility, and in response to a question as to whether or not he tests the coal for BTU, ash, and sulphur content, or rejects any coal and sends it back to the producers, Mr. Bealko stated as follows (Tr. 102Ä103):

A. We have a general understanding of what mines are coming in. The broker takes most of the samples out in the field at the mines prior to coming into the loading facility. We know at that point what coal goes on what order because the broker is more or less handling the sample. They have their own lab and everything. As far as Marion Docks actually doing any of the sampling, it is out of our hands because the broker handles most of that. What we know is that coal company "A" is hauling in and it is at a certain spec and that is what it is supposed to hit. We put it into the barge. You know, it is up to the broker and the producer to make sure that that happens. All we are doing is sizing the coal and putting it into the barge.

And, at (Tr. 120Ä122):

A. The broker organizes the sampling of the coal as it goes into the barges.

Q. Well, he organizes, but where is it done physically? Where is the sampling done? Is it done there at the dock?

A. It is done at the plant but they do a preliminary sampling when the coal is being loaded into the barges periodically to make sure the coal is being loaded, you know, prior to going to the customer correctly.

Q. What plant are you talking about?

A. The power plant. In other words, the coal gets sampled at the plant. It is done through an automatic sampler.

Q. Okay.

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A. On occasion, most brokers will spot check the coal being loaded at the docks.

Q. Okay.

A. So, they will come in with an independent lab that goes in and samples the barges prior to it being shipped down river so they know the specification of the coal prior to it going to the plant, so they can represent to their customer that here is what we have loaded and here is what is coming to you.

Q. And, Marion Docks is not involved in that at all.

A. No, no, we leave that strictly up to the broker. That is their connection with the plant. All we do is, like I say, the handling of the coal that goes into that barge.

Mr. Bealko confirmed that all of the coal shipped from Marion Docks goes to utility companies in the "tri-state area," and in some circumstances the coal is shipped out of state (Tr. 105). In the event barges are unavailable for a shipment of coal which has been ordered to a particular specification, the coal is stock piled at Marion Docks. If a barge is available, the coal is processed through the facility, and is sized. If it is already sized, it is taken to a surge hopper, dumped in a bin, and transported by a conveyor belt to the barge. Some of the coal which has been previously sized, screened, or washed at the mine, goes directly to the barge (Tr. 107). In response to a question as to what would occur if coal is trucked to Marion Docks from different coal producers and no barges are readily available for immediate shipment, Mr. Bealko responded as follows (Tr. 108-110):

JUDGE KOUTRAS: And, what happens to them? Are they stockpiled in 15 different piles?

THE WITNESS: No. Normally in our plant right there, we can crush coal or size coal or stockpile coal ahead of the barges getting there.

JUDGE KOUTRAS: Okay. Knowing that the customer's needs are.

THE WITNESS: Exactly. We will know from the broker which barge is ordered up, and we can go

ahead and crush or size or just place coal over the bin on five to six barges prior to the barges showing up.

JUDGE KOUTRAS: So, you do, in fact, then, if you pardon the expression, and it might bring a twinge to counsel over there at the table, Mr. Lawrence, but you do custom blending, don't you, loosely stated?

THE WITNESS: Or we use one particular coal for one order and one particular coal for another order and some of it gets stockpiled and some of it gets processed for the barges coming in.

JUDGE KOUTRAS: But depending on what the broker tells you, theoretically you could --

THE WITNESS: Load what -- there is not one particular coal for a particular order that comes in down there.

JUDGE KOUTRAS: That's what I'm saying. So, you crush and blend and size and stockpile awaiting the barge to the specification of the customer, of a customer; isn't that true?

THE WITNESS: In most circumstances.

* * * * *

THE WITNESS: We are just more or less the loader.

JUDGE KOUTRAS: I know but in order for you to ship the right coal, the right blend of coal --

THE WITNESS: Oh, we have to know the specifications.

JUDGE KOUTRAS: -- you have to know the specs, don't you?

THE WITNESS: Exactly.

JUDGE KOUTRAS: And, you do, in fact, do the blending process, don't you?

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THE WITNESS: If the coal needs to be blended, we do it.

JUDGE KOUTRAS: If it needs to be done, you do it.

THE WITNESS: We do it, right.

JUDGE KOUTRAS: And, if it doesn't --

THE WITNESS: Right.

JUDGE KOUTRAS: In other words, if all of this was done prior to coming to Marion Docks, all of the sizing and the blending and the washing, and it is just ready to be shipped, then it will simply go from the mine, already processed, to truck and to the barge, right?

THE WITNESS: Exactly.

JUDGE KOUTRAS: There wouldn't be any need to go through this intermediary stop.

THE WITNESS: Exactly.

In support of its motion for summary decision, the contestant submitted the affidavit of Charles J. Sorbello, Marion Docks Vice-President, and it states in relevant part as follows:

1. Marion Docks is a privately-owned West Virginia corporation. It is not a subsidiary or division of any other corporation, nor is it the parent or holding company for any corporation.
2. Marion Docks owns and operates a coal loading facility and dock located on the Monongahela River in Fairmont, West Virginia. It does not own or lease any other real property.
3. At this loading facility, Marion Docks receives coal which is stocked on to its site and loads such coal onto river barges. The coal that is received at the site is transported from deep and surface mines not owned or leased by Marion Docks. When the coal arrives

at the Marion Docks' site, it is dumped and stockpiled on pads. The coal is then loaded into a tipple where the coal is crushed and then loaded into river barges. Marion Docks does not own or operate a washing or preparation plant, nor does it blend the coal before loading it onto barges.

4. Marion Docks does not own the coal which it receives for shipment.

5. Marion Docks' facility is not located on land from which minerals are extracted, nor is it appurtenant to such a mining area.

6. Marion Docks' facility is not a facility used in conjunction with the work of extracting minerals from the ground.

Contestant's Arguments

In support of its assertion that its Marion Docks loading facility is not a mining operation within the meaning of the Act, the contestant advanced the following factual and legal arguments.

Marion Docks is a privately-owned West Virginia corporation. It is not a subsidiary or a division of any other corporation, nor is it the parent or holding company for any corporation. Marion Docks owns and operates a coal loading facility and dock located on the Monongahela River in Fairmont, West Virginia. It does not own or lease any other real property.

At its loading facility, Marion Docks receives coal which is trucked on to this site. The coal which is received at the site is transported from deep and surface mines not owned or leased by Marion Docks. The coal is hauled by independent operators, not employed by Marion Docks. In addition, the trucks driven by such operators are not owned or leased by Marion Docks.

When the coal arrives at the barge loading facility, it is dumped and stockpiled on loading pads. The coal is then loaded into a tipple where it is loaded into river barges. Marion Docks does not own or operate a washing or preparation plant nor does it blend the coal before loading it onto barges. Marion Docks does not take title to the coal which it receives for shipment.

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The Marion Docks facility is not located on land from which minerals are extracted nor it is appurtenant to such a mining area. Marion Docks' facility is not a facility used in conjunction with the work of extracting minerals from the ground.

Marion Docks owns no coal reserves or coal leases. Marion Docks' customer is a coal broker with a contract for supplying coal to a utility located along the Ohio River. The broker is a separate corporate entity unrelated to Marion Docks. Neither the broker, nor Marion Docks, share common officers, shareholders, or directors. The broker orders the coal directly from one of a dozen mines which ship coal to Marion Docks. The broker also schedules delivery and arrival of the coal trucks to Marion Docks. The coal broker also arranges for arrival of river coal hauling barges at the Marion Docks facility. The broker is aware of the mineral and Btu qualities of the coal produced by each of the mines trucking coal to the Marion Docks facility. Marion Docks does not conduct tests to determine the specifications of any coal delivered to it. The broker either checks the specifications at the mine or at the Marion Docks facility.

The loading facility used by Marion Docks consists of a tipple facility comprised of moving conveyor belts. In the tipping process, the coal is crushed to pieces smaller than 4 inches square for ease of loading and unloading onto the river barges. In addition, the coal is passed over sizing screens thereby allowing all coal of the proper dimensions to pass onto a conveyor belt for direct loading onto the barges. Approximately 10 percent of the material does not drop through the sizing screens but is conveyed onward to a picking table for removal of rocks, bolts, other metal, and oversize chunks. This function serves a dual role of protecting the loading and unloading equipment and removal from the coal of nonspecific materials.

Inspector Delovich testified that he is informed by his superiors that a loading facility is subject to MSHA jurisdiction if it sizes, blends or cleans coal. He believed that Marion Docks sized and blended coal at its loading facility, although he agreed that the coal was not cleaned at the facility. Inspector Delovich also indicated that he has been instructed that if a loading dock is engaged in the loading of materials other than coal (e.g. gravel) then that facility is not subject to MSHA jurisdiction. He referred to a loading facility located adjacent to the Marion Docks facility which

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loaded both coal and gravel and indicated that to his knowledge MSHA had not exercised jurisdiction over that facility because of the gravel loading operations.

Contestant concludes that its Marion Docks facility does not fall within the statutory definition of the term "coal or other mine" because it is not "an area of land from which minerals are extracted" nor is it the "private ways and roads appurtenant to such areas" as provided for in the geographic parameters of a mine as defined in 30 U.S.C. 820(h)(1). With regard to the functional definition of a mine facility used in the extraction or preparation of coal, contestant asserts that it is the term "work of preparing the coal" as defined in 30 U.S.C. 802(i) which provides that Marion Docks is not subject to the jurisdiction of the Act. Contestant points out that this definition defines coal preparation as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." (Emphasis added.)

In support of its argument that it is not subject to MSHA's enforcement jurisdiction, contestant cites the case of Secretary of Labor v. Oliver Elam, Jr., Company, Inc., 4 FMSHRC 15 (1982), a case in which the Commission affirmed a Judge's decision that Elam's loading facility was not a "mine" subject to the Act. Contestant points out that in Elam the Commission indicated that the proper inquiry should focus on the nature of the operation and not solely upon whether or not one or more of the activities listed in section 802(i) of the Act was performed. Contestant argues that the Commission focused on several factors which are also present in its case, including the fact that the loading dock did not contract with either the mine operators from whom it received the coal nor with its customers to whom it delivered the coal, and concluded that although the coal was loaded through a tipple facility which included a hopper, crusher and conveyor belts, those facilities were used for loading the coal rather than for preparing it to meet market specifications.

In addition to the Elam case, contestant cites a decision by the United States District Court for the Southern District of Indiana, Donovan v. Inland Terminals, Inc., 3 MSHC 1893 (March 1985), in which the court found that MSHA lacked enforcement jurisdiction over a loading facility whose operator had no contracts directly with the coal operators from whom it received the coal nor with the customers who used the

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coal, and where the breaking, crushing and loading of coal was done to facilitate the loading operation.

Contestant maintains that its case is similar to the Elam and Inland Terminals cases, and dissimilar from the cases cited by MSHA in support of its jurisdictional argument, namely, Little Sandy Coal Sales, Inc. v. Secretary of Labor, 7 FMSHRC 891 (June 1985), and Secretary of Labor v. Mineral Coal Sales, Inc, 7 FMSHRC 615 (May 1985). In Little Sandy Coal Sales, Inc., the Commission found jurisdiction because the facility purchased raw coal from local mines, custom processed it, sized it to meet market specifications depending upon customer demands, and then loaded it onto barges for delivery to users. In Mineral Coal Sales, the Commission affirmed my jurisdictional finding that the "operation carried out by Mineral includes the custom blending and loading of coal to meet the . . . specifications and needs of its brokers and customers," and found that the various operations taking place at the Mineral Sales single site, when viewed as a collective whole, indicated that the facility was a mine. In essence, the Commission found no distinction between the loading facility and the broker who arranged such shipments and sales, and oversaw the custom blending. Contestant views this fact as a critical distinction from its case "where the Marion Docks facility is owned and operated primarily by Kevin Bealko, who has no interest in either the broker or any of the mines which ship coal through the facility."

Findings and Conclusions

The Jurisdictional Question

Section 4 of the 1977 Mine Act, 30 U.S.C. 803, states: "Each coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act."

Section 3(h)(1) of the Act, 30 U.S.C. 802(h)(1)(C), defines "coal or other mine" in relevant part as: "(C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from . . . the work of preparing coal or other minerals, and includes custom coal preparation facilities."

Section 3(i) of the Act, 30 U.S.C. 802(i), defines the term "Work of preparing the coal" as follows: "[W]ork of preparing the coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work

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of preparing such coal as is usually done by the operator of the coal mine."

The critical issues in this case are whether or not the loading operations taking place at the Marion Docks facility involve the "work of preparing the coal," and whether or not that facility is a "mine" subject to MSHA's inspection and enforcement jurisdiction. Contestant relies on the decisions in *Secretary of Labor v. Oliver Elam, Jr., Company Inc.*, 4 FMSHRC 5 (January 1982), and *Donovan v. Inland Terminals, Inc.*, 3 MSHC 1893 (March 1985), in support of its argument that MSHA lacks jurisdiction in this case. MSHA relies on the decisions in *Little Sandy Coal Sales, Inc., v. Secretary of Labor*, 7 FMSHRC 891 (June 1985), and *Secretary of Labor v. Mineral Coal Sales, Inc.*, 7 FMSHRC 615 (May 1985), in support of its argument that MSHA has jurisdiction in this case. An examination of these precedent decisions involving coal loading and preparation facilities engaged in activities similar to those by Marion Docks follows below.

The Elam case concerned a commercial dock operator whose loading facility loaded steel, ingot cars, pipe, tar pitch, and coal onto barges. Approximately 40 to 60 percent of the tonnage loaded at the dock was attributable to coal which was shipped to the customers of coal brokers who paid Elam to load the coal for shipment to customers designated by the brokers. Elam also owned construction equipment such as cranes, trucks, and bulldozers which it leased to others, and its employees were used interchangeably in its dock and equipment rental operations. The coal which was crushed by Elam was essentially crushed to one size solely to facilitate the barge loading process, and Elam did not prepare coal to market specifications or for any particular use, nor did it separate waste from coal or add any material to it.

In Elam, the Commission held that inherent in any determination as to whether an operation is properly classified as "mining" is an inquiry not only into whether the operation performs one or more of the activities listed in section 3(i) of the Act, but also into the nature of the activity performing such activities. Upon examination of Elam's activities with respect to its "work of preparing the coal" to make it "suitable for a particular use or to meet market specifications," 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. 4 FMSHRC, at 7A8 (January 1982).

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The Inland Terminals case was before the Court on a motion by the Secretary of Labor for a preliminary injunction enjoining Inland from denying entry to MSHA inspectors who sought to inspect Inland's operations. The facts in that case, as found by the court, reflect that Inland was a commercial dock operator who in addition to loading coal onto barges for its coal broker customers, also engaged in the business of repairing, rigging, and cleaning barges for any customers requiring such services. Upon instructions from its coal broker customers, to load a certain amount and type of coal, Inland ran the coal through its crushers, and occasionally blended different types of coal based upon the specifications which the broker customers found necessary to fulfill its contracts. Of the four crushers used by Inland to facilitate its loading operation, only one had the capability to separate coal from rock or other waste materials, and approximately 10 percent of the coal loaded bypassed the crushers and was loaded directly onto the barges. Notwithstanding the fact that Inland on occasion blended coal to customer specifications, the Court, relying on the Commission's Elam decision, found that Inland was not a mine covered by the Act, and stated as follows at 3 MSHC 1895:

The Court recognizes that certain factors in this case are distinguishable from the facts in Elam. However, based upon the facts presented at the hearing the Court concludes that, like Elam, the nature of Inland's operation militates more strongly toward a finding that Inland is a shipping or loading facility that handles coal and is not a "mine."

In the Mineral Coal Sales, Inc., case, the cited operator owned a facility known as Mineral Siding, which handled solely coal, and the facility consisted of a railroad siding, a storage yard, and a trailer that housed laboratory equipment for testing coal. Equipment at the site included a truck scale, a mobile tipple that crushed coal and conveyed it to railroad cars, a stationary tipple, grading tipple, and front-end loaders used to transfer coal from various stockpiles to the tipples. Mineral Coal Sales extracted no coal itself and was not affiliated with any producing mine or transportation company. The coal handled at its facility was purchased by coal brokers from producing mines or independent truckers. The brokers arranged for delivery of coal by truck to Mineral Siding and, after loading, for delivery by rail to the various customers of the brokers. Mineral Coal Sales charged the brokers a flat rate per ton of coal loaded onto the railroad cars.

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Coal trucked to Mineral Siding was weighed on a truck scale by an employee of Hubbard Enterprises, a coal broker operating at Mineral Siding. Coal of substantially the same quality was stockpiled together, and once the coal was stockpiled, Hubbard tested it to determine BTU, ash, and sulphur content, and its free swelling index. When coal was ready to be loaded for shipment to a customer, Hubbard informed Mineral Sales as to how many scoops of coal should be taken from particular stockpiles in order to fill the appropriate number of railroad cars comprising the order. Mineral Sales would then draw off the proper number of scoops from the stockpiles and dumped them into the hopper of the mobile tipple. A Mineral Sales employee operated the tipple and oversaw the loading of the railroad cars. The coal passed from the tipple hopper into a crusher unit where it was crushed to a uniform size. The coal then traveled on the tipple conveyor belt for loading into the railroad car. Once the car was loaded, Hubbard again sampled and tested the coal to ensure that the load met the specifications of the respective order. A stationary grading tipple was also present at the Mineral Siding facility. Coal passed over various sizing screens to separate "lump," "egg," and "stoker" coal, and the tipple was used primarily to produce coal for domestic consumption.

In contesting MSHA's enforcement jurisdiction, Mineral Coal Sales maintained that it was not a mine operator and that its Mineral Siding facility was not a mine. In my decision at 6 FMSHRC 809 (April 1984), I rejected both arguments, and found that unlike the operation involved in the Elam case, the coal loading process carried out at the Mineral Siding facility included a procedure and practice whereby the coal which was ultimately loaded and shipped to the customers of the broker (Hubbard) was mixed to their specifications and standards. I further found that the operation carried out by Mineral Coal Sales included the custom blending and loading of coal to meet the specifications and needs of Hubbard's customers. 6 FMSHRC at 840.

Upon review of my decision, the Commission affirmed my jurisdictional findings and conclusions, and stated as follows at 7 FMSHRC 620:

[W]e have no difficulty concluding that the business engaged in at Mineral Siding constitutes "mining" under the Act. At this facility coal is stored, mixed, crushed, sized, and

loaded--all activities included in the statutory definition of coal preparation. Furthermore, an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam at which was coal crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities are performed on the coal to make it "suitable for a particular use or to meet market specifications.". . . Thus, coal preparation occurs at Mineral Siding and MSHA properly asserted its inspection authority over the facility.

In response to Mineral Sales' contention that its employees at the Mineral Siding facility merely loaded coal from two or three different stockpiles under the direction and control of the broker Hubbard, a separate entity, the Commission ruled that the operations taking place at a single site must be viewed as a collective whole. Given the active presence and control exercised by Mineral Sales at the site, including the intermingling of personnel and functions among the various entities at the site, and the operation and supervision of the site by Mineral Sales after it terminated the various lease arrangements, the Commission concluded that Mineral Sales was properly found to be the operator of the mine.

Little Sandy Coal Sales, Inc. concerned a coal processing plant which purchased coal from local mines and processed it for household and commercial sales. Judge Melick relied on the Mineral Coal Sales decision in finding jurisdiction, and concluded that the storing, mixing, crushing, sizing, and loading of coal by Little Sandy to make it "suitable for a particular use or to meet market specifications," constituted a mining operation, and that MSHA properly asserted its inspection authority over the facility.

The facts in this case show that the contestant operates a coal loading tipple facility which loads and ships coal by river barges to several utility customers who purchase the coal from brokers. The brokers arrange for the purchase and sale of the coal which is produced at several mines and then shipped to Marion Docks by independent truckers. The contestant's president, Kevin Bealko, confirmed that he had previously operated coal tipple facilities on the B & O Railroad, and that he loaded and shipped coal produced at several local mines from that facility. Upon construction of the Marion Docks facility, which Mr. Bealko characterized as the "same

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type of plant" as the previous tipple facility, and believing that MSHA would begin inspecting the new facility "just like any other tipple that they inspected," the contestant filed for and received an MSHA Mine ID number. The facility was then inspected on a regular basis by MSHA for a period of 2 1/2 years, and the inspections have continued to the present. Mr. Bealko confirmed that his jurisdictional question was raised when he recently learned that other similar dock facilities in close proximity to his are not inspected by MSHA. Mr. Bealko identified one in particular, the R.P. Agerwald Dock, and he claimed that it is identical to his operation, but is not inspected by MSHA because of an asserted lack of jurisdiction.

The evidence adduced in this case establishes that the Marion Docks facility handles and processes coal which is trucked there from approximately 15 producing mines. The facility is equipped with a scale house, end loaders, hoppers, crushers, conveyor belts, chutes, draw-off tunnels, picking tables, bar grizzlies, stackers, bins, and hi-lifts, all of which are used to process and prepare coal for loading and shipment to utility customers. Although the coal is not washed, some of it is conveyed to picking tables where slate and other debris is "picked" from the coal. Some of the coal which has been sized or crushed at less than 4 inches before its arrival at the facility may be taken directly to a barge for loading, if one is readily available. If not, the coal is stockpiled. Coal which is larger than 4 inches and cannot pass through the loading tipple or the bucket loaders which receive it at the utility is conveyed to the crushers and picking tables, and coal which does not meet the broker's specifications is processed through hoppers and bar grizzlies which remove all of the coal fines.

The thrust of the contestant's jurisdictional argument is that it has no ownership interest or connection with any of the producing mines which ships coal to its facility, has no connection with the coal brokers, and that the coal processed through its facility is processed solely for the purpose of facilitating the loading of the coal at the dock, and the unloading of the coal at the point of destination. The contestant denies that it is engaged in any "custom coal blending," and it takes the position that none of its activities in connection with the "work of preparing the coal" involves the preparation of coal to meet customer market specifications.

While it is true that there is no evidence that the contestant, as a corporate entity, has any ownership interest in any of the producing mines which ship coal to its facility, one of

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its corporate officers, Charles Sorbello, has an ownership interest in at least two mines which sells and ships coal through the contestant's facility. However, I cannot conclude that these facts are particularly critical to any jurisdictional determination in this case. The fact that a coal preparation facility may have no connection with the coal extraction process or the mine operators who extract the coal is irrelevant to the question of whether or not jurisdiction attaches under the Act. See, e.g., *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir.1979), cert. denied, 444 U.S. 1015 (1980); *Marshall v. Tacoma Fuel Co.*, No. 77-104 (W.D.Va. June 29, 1981); *Secretary v. Carolina Stalite Company*, 6 FMSHRC 2518 (Nov. 1984); *Secretary v. Alexander Brothers, Inc.*, 4 FMSHRC 541 (April 1982).

With regard to the question as to whether or not the contestant's coal processing activities include custom blending of coal to meet customer or market specifications, I take note of Mr. Sorbello's affidavit in which he denies that any coal blending is done before the coal is loaded for shipment. I also take note of the fact that Mr. Sorbello did not testify in this case, and that Mr. Bealko was the only witness called by the contestant in support of its case.

Inspector Delovich testified that he observed coal being weighed, cleaned, crushed, stockpiled, and loaded at the Marion Docks facility. Although he observed no blending taking place, Mr. Delovich stated that in conversations with Mr. Bealko, Mr. Sorbello, Mr. Markovich, and other inspectors, he learned that blending was done at the facility. Mr. Delovich believed that low sulphur Pittsburgh coal was being blended with the high ash Sewickley coal, and that this was done as it was dumped and stockpiled. Mr. Delovich testified that during an inspection at the M & J Coal Company mine in connection with a mine fire, Mr. Bealko, Mr. Sorbello, and Marion Docks superintendent Frank Miller all expressed their concern in keeping the mine open because of the need to blend its low sulphur and ash coal with the other coal handled at the facility in order to sell it.

During a bench colloquy with the contestant's counsel regarding his motion for summary decision at the close of Mr. Delovich's testimony, counsel conceded that the contestant engaged in some of the activities connected with the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of coal (Tr. 70). Except for the washing and drying of coal, it seems clear to me that the evidence in this case supports a conclusion that the contestant's facility engaged in the other enumerated activities.

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With regard to any custom coal mixing or blending activities, contestant's counsel agreed that Mr. Delovich's testimony reflects that the coal processed at the facility is subjected to some kind of a mixing process before it is loaded for shipment. In the context of coal blending, counsel stated that "I think it is nothing more than taking a scoop from one pile and a scoop from another. To the extent that the loading facility does something other than that, there has been no testimony to that" (Tr. 69).

Mr. Bealko testified that all of the coal handled and processed at the Marion Docks facility must meet the customer's specifications before it is loaded for shipment. At several points during the course of his testimony, Mr. Bealko alluded to the fact that his facility does mix and blend coal to meet the specifications of a particular customer. For example, he stated that any coal which arrives at the facility which does not meet the broker's specifications is crushed and processed in order to meet those specifications (Tr. 78). Brokers who "order up barges" also inform Marion Docks as to the particular coal specifications which must be met before the coal is loaded for shipment, and these specifications may include the size of the coal, and its ash or sulphur content (Tr. 77). Marion Docks must insure that the coal meets the customer's specifications before it leaves the dock (Tr. 95). Although crushing and sizing may be done to meet the customer's coal size specification to facilitate the loading and unloading of the coal, some particular customer orders include analytical specifications to insure that proper moisture, ash, sulphur, and BTU content are met (Tr. 99).

Conceding that MSHA had jurisdiction over a prior coal tipple loading operation which he operated prior to the construction of his Marion Docks facility, Mr. Bealko characterized his prior operation as the "same type of plant" as the Marion Docks facility (Tr. 85). In explaining the coal loading and crushing operation carried out by the R.P. Agerwald Dock operating near his facility, Mr. Bealko stated that it "comingles it to hit certain specs just like we have to do, and he puts it in barges which are ordered up from brokers just like we have to do" (Tr. 87) (emphasis added).

Although Mr. Bealko confirmed that some of the coal which is received at the Marion Docks facility is already sized and prepared for shipment directly to a customer, he also confirmed that if a barge is not readily available for loading, coal is crushed and sized according to the customer's needs and then stockpiled while awaiting the arrival of a barge for

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loading (Tr. 108-109). Mr. Bealko candidly admitted that in most circumstances, the coal processed at the facility is crushed, sized, and blended at that facility in accordance with the customer's specifications (Tr. 109). In response to a direct question as to whether or not his facility is engaged in the blending process, Mr. Bealko responded "if the coal needs to be blended, we do it" (Tr. 110) (emphasis added).

After careful review and consideration of all of the testimony and evidence adduced in these proceedings, I conclude and find that the activities carried out at the contestant's Marion Docks facility constitutes "mining" under the Act, and that those activities place the contestant within its jurisdiction. The evidence establishes that the sole product handled at the facility in question is coal which is mixed, crushed, sized, stored, and loaded. All of these activities fall within the statutory definition of "coal preparation," and brings the contestant within the Act's jurisdiction. I reject the contestant's contention that its handling and processing of coal is merely to facilitate its loading and unloading. To the contrary, while it is true that some of the coal is processed for this purpose, the testimony and evidence adduced reflects that coal is also in fact custom blended, mixed, crushed, and sized at the facility in order to meet a particular customer's needs and specifications.

I reject the contestant's reliance on the Elam and Inland Terminals decisions. Those decisions were based on facts which indicated that the "work of preparing the coal" was accomplished solely to facilitate the coal loading process, rather than rendering the coal fit for any particular customer's needs or specifications. In my view, the facts presented in the instant proceedings are more akin to those presented in Mineral Coal Sales, Inc., supra, where my finding of jurisdiction was affirmed by the Commission.

Fact of Violations

As stated earlier, the contests were filed by the contestant for the purpose of contesting MSHA's jurisdictional claims, and the contestant confirmed that in the event of an adverse decision and rejection of its jurisdictional arguments, it will not contest the violations further and will pay any proposed civil penalty assessments for the violations in question. Under the circumstances, and in view of my rejection of its jurisdictional claims, all of the aforementioned contested citations and orders issued by Inspector Delovich on March 1, 1988, ARE AFFIRMED as issued.

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ORDER

In view of the foregoing findings and conclusions, the Notices of Contest filed by the contestant in these proceedings ARE DENIED AND DISMISSED. The previously filed motions by the contestant for summary decisions in its favor ARE LIKEWISE DENIED, and the contested citations and orders are all AFFIRMED.

George A. Koutras
Administrative Law Judge