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

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

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 88-227
A.C. No. 36-06475-03501

v.

PENNSYLVANIA ELECTRIC COMPANY,
RESPONDENT

Iselin Preparation Plant

DECISION

Appearances: Therese I. Salus, Esq., U.S. Department of
Labor, Office of the Solicitor, Philadelphia,
Pennsylvania for the Petitioner;
Timothy N. Atherton, Esq., Pennsylvania Electric
Company, Johnstown, Pennsylvania and John P. Proctor,
Esq., Bishop, Cook, Purcell, Reynolds, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging the Pennsylvania Electric Company (Penelec) with two violations of regulatory standards. The general issues before me are whether Penelec violated the cited regulatory standards and, if so, whether those violations were of such a nature as could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial". More specifically the threshold issue in this case is whether the specific areas cited in this case i.e. the head drives of conveyors 5A and 5B at Penelec's Homer City Steam Electric Generating Station, come within the Secretary's jurisdiction under the Act. If jurisdiction is established and violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. At hearing the parties submitted the case on joint stipulations of facts (Appendix A) supplemented by documentary evidence.

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Section 4 of the Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or 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." It is not disputed that the Secretary's jurisdiction in this case is accordingly to be determined by whether the head drives for the 5A and 5B conveyors at issue are part of a facility that is a "coal or other mine".

"Coal or other mine" is defined in Section 3(h)(2) as follows:

.... [A]n area of land and 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 preparation facilities ...

Section 3(i) defines "work of preparing the coal" 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."

The legislative history of the Act also indicates that the definition of a "mine" is to be given the broadest possible interpretation and that doubts should be resolved in favor of inclusion of a facility within its coverage. See S.Rep. No. 181, 95th Cong., 1st Sess., 1, 14, reprinted in 1977 U.S.Code Cong.Admin.News, pp 3401, 3414. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir.1979). See also *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C.Cir.1984); *Harman Mining Corp., v. Federal Mine Safety and Health Review Commission*, 671 F.2d 794 (4th Cir.1981); and *Cypress Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission*, 664 F.2d 1116 (9th Cir.1981).

In summary, for purposes of the jurisdictional issue before me, the relevant undisputed evidence shows that among other operations, raw coal is received at the Homer City truck receiving facility where it may then be conveyed through a crusher. Eventually the raw coal is transported by

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conveyors 5A and 5B (over the 5A and 5B head drives at issue) through Bin No. 2 and then to the Iselin Preparation Plant where it is broken, crushed, sized, washed, cleaned, dried and blended. The useable coal product is then directed for use in the generating station boilers to produce electrical energy.

Within this framework of evidence it is clear that at least some raw coal is transported on the 5A and 5B conveyor belts which run over the 5A and 5B head drives on its way to the Iselin Preparation Plant. At the preparation plant the coal is broken, crushed, sized, washed, cleaned, dried and blended in preparation for consumption in the Penelec generating station. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Act. It is also clear that the head drives over which the raw coal passes on its way to such preparation are "structures", "equipment", and "machinery" that is "used in or to be used in" the "work of preparing the coal". See *Secretary v. Mineral Coal Sales, Inc.*, 7 FMSHRC 615 (1985).

In distinguishing the *Mineral Coal Sales* case from the case of *Secretary v. Oliver M. Elam, Jr. Company*, 2 FMSHRC 1572 (1982), the Commission observed that an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam in which coal was crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities (coal storage, mixing, crushing, sizing and loading) were performed on the coal to make it suitable for a particular use or to meet market specifications. In the instant setting a similar broad range of coal preparation activities are conducted and are directed to the particular purpose of consumption in the Penelec generating station. Under all the circumstances it is clear that the head drives of the 5A and 5B conveyor belts are indeed subject to the Secretary's jurisdiction under the Act.

In accordance with the joint stipulations, Penelec does not challenge the findings that the 5A and 5B conveyor head drives were inadequately guarded as charged in the citations and that "MSHA had otherwise satisfied its burden of proof with regard to Citations Nos. 2884282 and 2884283 and the penalties proposed therefore". I have considered the documentation and other evidence submitted in these proceedings and conclude that the evidence does indeed support the violations and the proposed penalties. In particular I find that the operator is chargeable but with little negligence. It is undisputed that Penelec was

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operating on the good faith belief that the 5A and 5B conveyor head drives were subject only to the inspection jurisdiction of the Occupational Safety and Health Administration. Moreover it is undisputed that Penelec was in compliance with that administration's regulations.

ORDER

Citations No. 2884282 and 2884283 are affirmed as "significant and substantial" citations and the Pennsylvania Electric Company is directed to pay civil penalties of \$54 for each violation within 30 days of the date of this decision. In light of this decision on the merits the post-hearing Motion to Dismiss and/or For Summary Judgment filed by Respondent is denied.

Gary Melick
Administrative Law Judge
(703) 756-6261

Appendix A.

A. Procedural History

1. The Homer City Steam Electric Generating Station, Homer City, Indiana County, Pennsylvania, is operated by Penelec and owned by Penelec and the New York State Electric & Gas Corporation ("NYSEG"), each with an undivided fifty percent ownership interest.

2. On August 25, 1977, Penelec met with, discussed and reached a verbal understanding with the Mining Enforcement and Safety Administration ("MESA"), predecessor of the Mine Safety and Health Administration ("MSHA"), regarding MESA's and the Occupational Safety and Health Administration ("OSHA")'s jurisdiction over the coal cleaning and coal handling facilities at the Homer City Station.

3. On January 7, 1988, MSHA inspector John Kopsic issued two citations to Penelec for alleged violations of 30 C.F.R. 77.400(c) at the Homer City coal handling facility in an area known as "Conveyors 5A and 5B" (e.g., the No. 5A and 5B head drives for the belt conveyor were inadequately guarded). (See, "Coal Flow Diagram", attached hereto as Exhibit "A").

4. Notwithstanding the August 1977 understanding, MSHA has without Respondent's knowledge inspected the head drives of the 5A and 5B conveyors and did so on January 7, 1988, without prior notice to Penelec.

5. Shortly after issuance of the subject citations, Penelec requested an informal conference which was held among various Penelec and MSHA personnel on or about February 18, 1988. MSHA refused to vacate the subject citations. Richard E. Orris, Penelec's former Manager—Safety, by letter dated February 25, 1988 to Donald W. Huntley, MSHA District 2 Manager, referenced the August 1977 meeting and requested clarification from MSHA on the question of jurisdiction.

6. By letter dated April 12, 1988, Mr. Huntley informed Penelec that MSHA would be expanding its inspection activities to encompass several additional areas of the coal handling facility, including the head drives of conveyors 5A and 5B. These inspection activities would include: (1) Bin No. 1 Building, including feeders, the control room and the tails of the 5A and 5B conveyor belts; (2), Bin No. 2 Building, including motors, the plug shoot probe, control button, Conveyors 5A and 5B, and all floors; (3) Motor Control Circuit Room next to Bin No. 2 from the

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Lucerne No. 6 drawoff tunnels, the No. 3 chute; conveyor, and silo, the No. 24C and 25C raw coal belts, the Grundlack crusher (not used since 1982); (4) the Pennsylvania Crusher, a truck dump, two scale houses three auger samplers, the Machine Mill drawoff tunnels, (observed in operation by Inspector Kopsic) the No. 1T, No. 2T, No. 3T and No. 4T belts, and the four raw coal truck silos and all adjoining belts.

7. Penelec's schematic "Coal Flow Diagram," attached hereto as Exhibit "B", demonstrates the movement, of coal within the Homer City coal handling facility and shows MSHA's inspection activity prior to the January 1988 inspection and as enunciated in Mr. Huntley's April 12, 1988 letter.

8. On May 16, 1988, Penelec received notification from MSHA of a proposed assessment for each violation in the amount of \$54.00.

9. On May 25, 1988, Penelec requested a formal hearing with the Mine Safety and Health Review Commission on all violations listed in the proposed assessment.

10. On June 29, 1988, Penelec received a "Petition of the Secretary of Labor for Assessment of Civil Penalty."

11. On July 28, 1988, Penelec filed an Answer to the aforesaid petition and set forth as an affirmative defense MSHA's lack of jurisdiction over Conveyors 5A and 5B and the additional areas outlined in Mr. Huntley's April 12, 1988 letter. Penelec does not challenge the Inspector's finding that the 5A and 5B conveyor head drives were inadequately guarded and that MSHA had otherwise satisfied its burden of proof with regard to Citations Nos. 2884282 and 2884283 and the penalties proposed therefore.

12. On August 3, 1988, Administrative Law Judge Gary Melick issued a pre-hearing order instructing the parties to discuss by August 22, 1988 possible settlement, witnesses, stipulation of material facts and trial dates.

13. On August 22, 1988, the parties filed a motion for extension of time until September 22, 1988 to comply with the pre-hearing order. The motion was granted by Judge Melick.

14. On August 31, 1988, Penelec filed an "Application for Temporary Relief" and on September 9, 1988, counsel for the Secretary of Labor filed an objection to the application for temporary relief.

15. On September 7, 1988, a meeting was held in Philadelphia between Penelec and MSHA representatives in order to resolve amicably the matters at issue.

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16. No agreement was reached and on September 15, 1988, Judge Melick conducted a conference call with the parties and a hearing date was set for September 23, 1988, which date was rescheduled at Penelec's request to October 18, 1988 in Hollidaysburg, Pennsylvania.

B. Penelec's Operations at the Homer City Generating Station

17. The Homer City Generating Station produces electrical energy by the combustion of coal. The Generating Station has three generating units: Two (2) 600,000 kilowatt units (Units Nos. 1 and 2) placed in service in 1969 and a third 650,000 kilowatt unit (Unit No. 3) which began operating in 1977. Homer City Station burns approximately 4.5 million tons of Pennsylvania coal each year.

18. The Secretary does not claim there is jurisdiction under the Act regarding working conditions inside any of the electric generating facilities at the Homer City Station. Those conditions are regulated by the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq.

19. The sulfur dioxide emission limitation requirement established by the Pennsylvania Department of Environmental Resources for Units Nos. 1 and 2 is 3.2 lbs of SO₂ per mmmBtu heat input; the sulfur dioxide emission limitation requirement established by the U.S. Environmental Protection Agency for Unit No. 3 is 1.2 lbs of SO₂ per mmmBtu heat input.

20. The Homer City Generating Station is supplied with coal from three sources: Helen and Helvetia (Lucerne 6, 8 and 9) mines, which are under MSHA's jurisdiction, and a truck receiving facility where coal is delivered by various outside sources. (See, Exhibits "A" and "B").

21. All coal purchases by Penelec from either the Helen or Helvetia mines or purchased from other sources and delivered at the truck receiving facility, is consumed at the generating station.

1. Coal purchased from Helen and Helvetia mines

22. Coal purchased from the Helen or Helvetia mines is delivered by conveyor belt to scales where it is weighed, sampled automatically, and title passes to Penelec and NYSEG. (See, Exhibits "A" and "B").

23. The coal from the Helvetia mines proceeds by conveyors Nos. 3 and 4 directly to Bin No. 1, where it is combined with coal from the Helen mine which also is transported to the Bin by

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conveyors Nos. 1 and 2. Previously, the coal from the Helvetia mines could proceed via a Grundlack crusher (still in place) that was used for experimental purposes from 1977 until 1983. At Bin No. 1, the coal from the Helen and Helvetia mines is sampled again and then placed on conveyors 5A and 5B which transport the coal to Bin No. 2.

24. Though, after the coal is sampled, there exists the capability to divert the coal from Bin No. 2 directly to the generating station, because the Helen Helvetia coal generally does not comply with EPA standards, this is rarely done. Rather, most of the coal travels from Bin No. 2 to the coal cleaning plant owned by Penelec and NYSEG and operated by the Iselin Preparation Company, a subsidiary of Rochester and Pittsburgh Coal Company. (See, Exhibits "A" and "B").

25. The coal cleaning plant, which breaks, crushes, sizes, washes, cleans, dries and blends the coal, was constructed in 1977 to provide medium sulfur compliance coal for Units Nos. 1 and 2 and low sulfur compliance coal for Unit No. 3. The Iselin Coal Preparation Plant has been inspected by MSHA since 1977.

2. Coal purchases and delivered by truck

26. When coal is delivered to the Homer City truck receiving facility, it is weighed, auger sampled and title passes to Penelec and NYSEG, after which the coal is dumped into one of four hoppers. (See Exhibit "A").

27. From the truck hoppers, the trucked coal (.6% sulfur or 1.6% sulfur or "raw" coal) is separately transported by conveyor, through the Pennsylvania Crusher, where, unless the coal is frozen or clumped together, as it was during Mr. Kopic's January 1988 inspection, the coal ordinarily bypasses the crushing mechanism. From the Pennsylvania Crusher, the coal continues on conveyor 2T to a bypass chute. From the bypass chute, the trucked coal is transported by conveyors Nos. 3T and 4T to a distribution point on top of the truck coal silos. (See, Exhibits "A" and "B").

28. From the distribution point, the low sulfur coal (0.6% sulfur) is transported by conveyor 7T to clean coal silos for direct use in Unit No. 3.

29. Medium sulfur coal (1.6% sulfur--which Respondent purchases periodically but has not done since January 1988), on the other hand, is distributed into any of the four (4) truck coal silos and then by conveyor 6T to a point immediately outside Bin No. 1 onto conveyors 5A and 5B for transport to Bin No. 2. From Bin No. 2, the medium sulfur coal proceeds by conveyor for use in Units Nos. 1 and 2.

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30. Run of mine or "raw" coal follows the same path as the medium sulfur coal (1.6% sulfur) except that at Bin No. 2, the "raw" coal is diverted and transported by conveyor 1C to the coal cleaning plant (See Exhibits "A" and "B").

3. Coal from the coal cleaning plant

31. The coal cleaning plant produces three products: (a) 15-20% of the total feed is refuse and is transported via truck by Iselin personnel to a refuse storage area; (b) 15-20% of the total feed is Unit No. 3 product and is delivered to the clean coal silos via Conveyor 17C or to the clean coal stockpile via Conveyor 21; and (c) the remaining 60% of the feed is Units Nos. 1 and 2 product and is delivered by Conveyor 8C back to the top of Bin No. 2 where it is distributed to the stockpile via Conveyor 6 or through Feeders 7A and 7B onto Conveyor 7 to the stacker reclaimer.

32. The stacker reclaimer either directs the coal to an active stockpile for later reclamation or passes the coal directly to the generating station boilers.

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EXHIBIT A

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EXHIBIT B