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SOL (MSHA) V. S H M COAL
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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. KENT 88-104 A.C. No. 15-16245-03501
v.	Docket No. KENT 88-159 A.C. No. 15-16245-03502
S H M COAL COMPANY, RESPONDENT	No. 1 Surface Mine

DECISIONS

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
John T. Aubrey, Esq., Aubrey and Bowling, Manchester, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). In Docket No. KENT 88-159, the petitioner seeks a civil penalty assessment in the amount of $400, for an alleged violation of mandatory new miner training standard 30 C.F.R. 48.25(a). In Docket No. KENT 88-104, the petitioner seeks a civil penalty assessment of $20, for an alleged violation of mandatory Notification of Legal Identity standard 30 C.F.R. 41.10, and a civil penalty assessment of $195 for an alleged violation of mandatory training standard 30 C.F.R. 48.23(a)(3), for failing to file a mine training plan.

The respondent filed timely answers denying and contesting the alleged violations, and it denied that it was operating a coal mine subject to the jurisdiction of the Act at the time the citations were issued. A hearing was held in London, Kentucky, and the parties were afforded an opportunity to file

posthearing briefs. The petitioner filed a brief, but the respondent did not. In addition to the briefs, I have considered all of the oral argument made by the parties during the hearing in my adjudication of these matters.

Issues

The principal issues presented in these proceedings is whether the respondent's alleged coal mining operation constitutes mining as defined by the Act, whether the alleged mining activity involved interstate commerce, and whether the respondents, as independent contractors, are accountable for the alleged mining activity conducted on the land owned by someone else, and whether they are chargeable for the owner's intent to extract such coal.

Assuming it is found that the respondent was engaged in coal mining as defined by the Act, the next issue presented is (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that on October 27, 1987, Mr. Eugene Mills purchased a case of dynamite from Laurel Explosives, Inc., and that on November 11, 1987, Mr. Curtis Smith purchased a case of dynamite from this same company (Tr. 6-7).

Discussion

In Docket No. KENT 88-159, MSHA Inspector Alex R. Sorke, Jr., issued section 104(g)(1) "S&S" Order No. 3004622, dated November 16, 1987, pursuant to section 115(a)(2) of the Act, and it states as follows:

> Eugene Mills, James Harris and Curtis Smith, laborers at the No. 1 Surface Mine, have not received the requisite safety training as stipulated in section 115 of the Act. All of these men have been determined to be new miners which have received none of the required 24 hours of new miner training. In the absence of such training each man is declared to be a hazard to himself and others and is to be withdrawn from the mine until he has received the required training. A citation (No. 3004623) for a violation of 30 C.F.R. 48.25(a) has been issued in conjunction with this order. This is an illegal mining operation.

Inspector Sorke also issued section 104(d)(1) "S&S" Citation No. 3004623, on November 16, 1987, and he cited a violation of 30 C.F.R. 48.25(a). The cited condition or practice is as follows:

> Eugene Mills, James Harris and Curtis Smith determined to be new miners working in the 001 pit have not received any of the required 24 hours of new miners training. All of these men stated it had been 6 years or longer since they had any training. This is an illegal mining operation and has no training plan. A 104(g)(1) Order (No. 3004622) has been issued in conjunction with this citation.

Docket No. KENT 88-104, concerns a section 104(a) citation and a section 104(d)(1) order issued by the Inspector to the respondent. The citation and order is dated November 16, 1987, and they are as follows:

Section 104(a) Non-"S&S" Citation No. 3004621, cites a violation of 30 C.F.R. 41.10, and the condition or practice states as follows:

> Mining operations have commenced at the mine and the operator has not submitted a legal identity report to the MSHA District Manager. This is an illegal mining operation.

Section 104(d)(1) "S&S" Order No. 3004624, cites a violation of 30 C.F.R. 48.23(a)(3), and the condition or practice states as follows:

> Mining Activities have commenced at the mine and the operator has not submitted a training plan for approval by the MSHA District Manager. This is an illegal mining operation.

Petitioner's Testimony and Evidence

Pansy Hamm, General Manager, Laurel Explosives, Inc., East Bernstadt, Kentucky, confirmed from copies of her records that she sold a case of dynamite to Mr. Eugene Mills on October 27, 1987, and a case of dynamite to Mr. Curtis Smith on November 11, 1987. She identified a photograph of a case of dynamite as the type she sold (Exhibit P-1). She also explained the procedure for purchasing explosives, and confirmed that a purchaser need only show a driver's license and fill out a form, and that the company does not verify how the explosives were used (Tr. 8-14).

On cross-examination, Mrs. Hamm stated that the explosives purchased by Mr. Mills and Mr. Smith are typical of purchases made by many small mine operators, and that she deals with many such companies. She also indicated that more potent explosives are purchased by mine operators depending on their intended use, and that explosives are also purchased for agricultural use, stump removal, or for small strip mine operations. Mrs. Hamm confirmed that she does not personally know Mr. Mills or Mr. Smith (Tr. 14-17).

Thomas Spellman, Special Investigator, State of Kentucky Department of Natural Resources, testified as to his duties, and he confirmed that they included flying in a helicopter to view "illegal" mine sites. Mr. Spellman identified photographic exhibits P-3, as photographs which he took from the helicopter on November 18, 1987, and he confirmed that he recognized MSHA Inspector Sorke's truck on the ground and recognized him standing in the roadway near the site in question.

Mr. Spellman stated that a legal mining operation pursuant to state law requires a permit, and that it is usually identifiable by markers. He confirmed that the site in question had no permit, and he observed no markers. He confirmed that he has investigated more than 1,000 such sites during his 7 years as a special investigator, and that the site in question had all of the usual characteristics of a surface mining operation, including a highwall, an exposed coal pit, and heavy equipment parked in the area. He stated that the site was approximately 122 feet long and 50 feet wide, and that the exposed coal depth was approximately 2 feet.

Mr. Spellman stated that in his opinion, the depth of the excavation at the site, and in particular the 40 foot highwall, was not necessary for the construction of a house seat. He also was of the opinion that the site in question looked like a typical mining operation (Tr. 17-31).

On cross-examination, Mr. Spellman stated that he did not speak with Inspector Sorke on the day that he took the photographs, and that he had no knowledge that any MSHA citations were issued. Mr. Spellman confirmed that his discovery of the site in question was made during a routine "fly-over" of the area and that his office had received no complaint about any mining operation at the site.

Mr. Spellman confirmed that while he observed that coal was exposed, as shown in the large photograph, he saw no evidence that any of it had been removed or stockpiled, and could not determine whether any explosives had been used at the site.

Mr. Spellman stated that another separate state department has regulatory enforcement jurisdiction over surface mining operations, but only in cases where more than 450 tons of coal is exposed, extracted, and removed from the property with the intent to sell it. In these instances, the state would prosecute the offending party. In the instant case, Mr. Spellman confirmed that he had no knowledge that any coal had been removed and taken off the property, and that all of the information that he obtained with respect to the site in question was turned over to special investigator Michael Hall, a fellow enforcement officer in his department (Tr. 31-46).

MSHA Inspector Alex R. Sorke, Jr., testified that his duties include the investigation of illegal mining activities, and that he went to the site in question after receiving an anonymous call. He considered the operation to be illegal because no mine plan or other paperwork had been filed with MSHA (Tr. 47). He visited the site with State of Kentucky Mine Investigators George Eugene Hollis and Herman Williamson, and found that the mine "was working." He observed a dozer, a tractor with a scraper pan on the rear, and a highlift. He also found explosives which were used to shoot and create the highwall, and push brooms were being used to sweep the coal in preparation for its removal.

Mr. Sorke identified exhibit P-1 as a photograph of an empty box of explosives, and he confirmed that the explosives had already been used and were not at the site. He confirmed that he spoke with Mr. Mills, Mr. Harris, and Mr. Smith, at the site, and established that they were the operators (Tr. 49).

Mr. Sorke confirmed that he observed "leg wires," which are used to detonate explosives, in the overburden after it had been shot. He also confirmed that most of the equipment was removed from the site during his initial visit on November 16, 1987, and that when he next returned to the site on November 18, all of the equipment had been removed (Tr. 51).

Mr. Sorke stated that when he left the site on November 16, he believed that the three individuals in question were going to visit the local UMWA office to determine what was required to complete their training, and they informed him that they had cleared the site. However, at this time they said nothing to him about preparing a house seat or building a house, and during the course of his conversation with the individuals, Mr. Sorke believed that they agreed to do what was necessary to obtain their mine plans and complete the required preliminary work (Tr. 54).

Mr. Sorke identified exhibits P-4(a) through P-4(g) as photographs of the equipment, the site, and the pit, and he explained the procedure which would have been used to prepare the coal for removal, and he confirmed that they were taken on November 16 (Tr. 55-59).

Mr. Sorke stated that he served the citations on November 18, because he had to first obtain a mine legal ID number to place on the citation forms. He confirmed that he helped the three individuals fill out the necessary MSHA legal Mine ID form on November 16, and that he filled out the information for them (Tr. 60-61).

Mr. Sorke confirmed that after completing the Mine ID form (exhibit ALJ-1), he returned to his office to complete the citations (exhibits P-5 through P-8), and he then took them to the site on November 18. However, he confirmed that he issued the citations "verbally" on November 16, and that "I told them everything" (Tr. 66). He confirmed that he was aware of the fact that there was no mine ID number on file with MSHA before he visited the site (Tr. 68).

Mr. Sorke confirmed that the effect of his section 104(g)(i) order was to close the site because it removed everyone from the site until they could be trained. He also confirmed that he issued Citation No. 3004623, because the individuals admitted that they had not received the required new miner training (Tr. 68-69). He issued Citation No. 3004624, because no mine training plan was on file with MSHA's district office (Tr. 70).

Mr. Sorke stated that when he returned to the site on November 18, the individuals in question for the first time "started talking about it being a house seat" (Tr. 73). He then served the citations on them. Mr. Sorke confirmed that he subsequently returned to the site and made certain measurements. He determined that the pit averaged 150 feet long, 50 feet wide, and that the coal was approximately 2 feet in depth. The hignwall center was 60 feet high, and the ends measured approximately 42 feet in height. Based on these measurements, he estimated that the pit contained approximately 488 tons of exposed coal (Tr. 75). He believed that the highwall and coal "was freshly exposed" and was not there for any length of time. He estimated that all of the exposed coal could have been removed in one day (Tr. 75-76).

Based on his prior experience with similar operations, and the equipment which was present, he estimated that the three individuals could have constructed the highwall, exposed the pit, and removed the coal in 2 weeks, working 40 hours a week (Tr. 76). He also confirmed that in the course of his prior investigations of similar sites, "I have been told hundreds of times that it is going to be a house seat, trailer park, a pond. I can show you a shopping center," but that he never saw any of these structures actually erected on these sites (Tr. 77).

Mr. Sorke was of the opinion that the site was a mine site and not a house seat because the spoil was pushed over the hill and into the trees, and the trees were all knocked over. Anyone constructing a house seat would clear the land first and then smooth out the site and would not simply push the spoil over the hill. He also indicated that the grade leading to the site was very steep, and although there was a good road, it was not ditched, and was not the type of road that one would construct for access to a house because one would need a tractor or four-wheel drive to reach the site (Tr. 79). He also confirmed that an old inactive strip pit was located below the site in question (Tr. 80).

On cross-examination, Mr. Sorke stated that he communicated and spoke with Mr. Clarence Mills, the individual who had an ownership interest in the property, and the person who purportedly contracted with the respondents to construct the house seat, but was not certain whether he contacted him before or after he issued the citations (Tr. 85). Mr. Sorke confirmed that Mr. Mills told him that he was having a house seat built and that he was interested in being able to remove the coal (Tr. 86). He indicated that he met with Mr. Mills before and

after the site was closed, during his investigation of other illegal mining operations on his property (Tr. 87).

Mr. Sorke confirmed that Mr. Mills told him that the three respondents were building a house seat, and that when he told him this the mine had been closed. Mr. Sorke stated that Mr. Mills asked him whether or not he could remove up to 250 tons of coal as permitted by the State of Kentucky, and also asked him about leaving the coal. Mr. Sorke stated that he advised Mr. Mills that no coal could be removed under MSHA's regulations because the site was closed (Tr. 90-96). Mr. Mills also advised him that the respondents were instructed not to take any of the coal (Tr. 97).

Mr. Sorke confirmed that although no coal was actually removed from the site in question, had he not acted and closed the site, he believed the coal would have been removed (Tr. 98). He believed that all of the preparation work for coal removal had been completed at the time he issued the order, and that the sweeping of the coal was the last step immediately prior to taking out the coal. At this point in time, it was Mr. Sorke's opinion that the site was in fact a coal mine (Tr. 99).

Mr. Sorke stated that his estimate that the coal in the pit was 24 inches deep was based on a hole that was dug in one section of the pit, but he did not know who dug the hole (Tr. 107, Exhibit P-4(h)). He also agreed that "nobody in their right mind would build a house on coal" (Tr. 101). When asked whether a violation would occur if the coal were pushed aside in order to reach solid ground for a house seat, Mr. Sorke responded as follows (Tr. 101-102):

> A. It depends on what else is involved. If there's equipment used on the site, or if there's explosives used on the site, or there's other means to connect the site to Interstate Commerce, then yes.
> If they went up there and they hand-shoveled it all off and got down to the coal --
>
> Q. Let's say they had four D-9s up there, and pushed it off to the side.
>
> A. Yes, pushed it to the side and they got to the coal and they pushed it up, we would still consider it a mine.

Q. You would assume that at some time it would enter Interstate Commerce?

A. It's the fact that the coal itself does not have to enter Interstate Commerce to make it an inspectible (sic) site under MSHA regulations.

Q. So anybody that would be clearing an area on their land in eastern Kentucky that pushed the coal aside would be written up for not having a mine license, training and what these gentlemen have been written up for?

A. Depending on the circumstances involved, yes.

Q. And Mr. Mills told you the circumstances were, number one, he wanted a house seat; and number two, these boys weren't to remove any coal?

A. That's correct. He also said that he got on to them for getting down -- they weren't supposed to go down to the coal level.

Mr. Sorke confirmed that he made no inquiries of any local tipples to determine whether the respondents had in fact sold any coal because he saw no need to in view of the fact that no coal was ever removed from the pit (Tr. 103). Mr. Sorke had no personal knowledge that the respondents were ever connected with any prior coal mining activities (Tr. 103). He confirmed that he suggested the initials "S H M" be used for the name of the respondent company because he needed a company name in order to obtain a mine ID number, and that the respondent's agreed to the use of the initial's of their last names. Mr. Sorke denied that they said anything about any construction company, and he denied that the respondents told him on November 16, that they were clearing a house seat for Mr. Clarence Mills (Tr. 104-105).

In response to further questions, Mr. Sorke confirmed that he did not completely discount the possibility that a house could have been placed of the site which was being excavated because "when you make a level spot out, you can put a house on it" (Tr. 115). He reiterated that in his 10-1/2 years of experience, he has never seen a house constructed on any site similar to the one in this case. However, he agreed that it would not be unusual to level out enough of a spot on a

hillside to build a home, and that the site in question could have been developed further in either direction (Tr. 116).

Mr. Sorke confirmed that it would have been economically feasible to move the available 488 tons of coal out of the site over a 2-week period, and at the then-prevailing market price of $23 a ton, the coal would sell for close to $9,000 (Tr. 117). He also confirmed that he did not discuss with the respondent's their reasons for digging down to expose the coal seam, and he confirmed that they offered no explanation as to why this was done (Tr. 120).

George Eugene Hollis, Investigator, Kentucky Department of Natural Resources, confirmed that he visited the site in question on November 16, 1987, with his partner Mr. Herman Williamson, and Mr. Sorke. Mr. Hollis stated that he observed that the pit had been opened up, the coal was exposed, and he observed a highlift or loader, a small farm tractor, and a small bulldozer at the site. He also observed James Harris sweeping off the top of the exposed coal with a broom, and that was all of the work which was taking place. Mr. Hollis stated that "By virtue of cleaning it off, by all appearances, they were getting ready to load it, break it up and load it" (Tr. 129-130).

Mr. Hollis stated that based on his experience in investigating illegal mines since 1982, the site he observed on November 16, 1987, was in all general appearances, the same as any other site he has investigated. He considered the site in question to be a mine operation, and for that reason he posted a closure order on the site, "and that prohibits them from hauling the coal" (Tr. 131).

In response to a question as to what led him to conclude the site in question was a mining operating, Mr. Hollis responded as follows at (Tr. 131-134):

> A. As we said already, from all appearances of mining equipment, cleaning the coal off to get rid of the hash, to make the coal as good a quality as possible, and also when we first went up, if I remember correctly, the men wouldn't talk to us hardly at all to start with.
>
> They just sort of hee-hawed around. But eventually -- well, one of our first questions when we go on any site is who's the operator? Whose job is this? Of course, they wouldn't tell us to start with. But after a while, after<<PCITE, 11 FMSHRC 1164>>we began to talk and things get a little bit more at ease, then they finally said, "Yes, it's our job."
>
> Q. Did they say "It's our job building a house seat?" Did anybody mention a house seat when you were up there?
>
> A. No.

Q. Were there any other things that led you to believe that it was a coal mine operation?

A. Well, again, we just -- all of the assumptions that were made in all the appearances is that it was a coal mine, and when we asked them what name they wanted to put it in, the closure itself by virtue of it, was saying that this was a coal mine.

We are going to write this closure to prohibit you from hauling the coal. You don't have a mine license on it with the Department of Mines and Minerals. The closure itself states that fact. Also what name do you want to put this in. Well, put it in S H M.

Q. They told you to put it in S H M?

A. Yes.

Q. When you were giving them all these papers that said all this stuff about coal operations and mining coal, did they give you any indications by the conversation that they knew that you considered it a coal mine operation?

A. Yes, as a matter of fact, when we began to explain our recommendations are the they did not have a license; they did not have mine maps; and also, that no coal would be produced. In explaining these, in other words, we show them the closure and give them a copy of the closure.

* * * * * * *

Q. When you left that, did you expect to have them come in the office in a short time and acquire a mine license?

A. Yes, we told our supervisor, and the way my partner and myself, and I suppose Mr. Sorke, felt that within probably a week to two weeks' time that they would be in. That's the feeling, you know, again that we had.

Q. Did they express anything about removing the coal? Did they say anything to you about removing the coal?

A. Not exactly because all of the entire conversation was that as far as the mine closure and everything was the fact that it was going to prohibit them from hauling the coal.

And, at (Tr. 145-146; 148-149):

A. Just on first notice, just on the top of my head, two things. The site on Mills Creek where the coal was exposed, it was pitted back. It had two sides to it. It was pitted back, the highwall, actually on either end and the back.

Coal was exposed. They were cleaning the coal for market use. You know, if the coal was just going to be generally taken up, you wouldn't have to worry about it. If you are going to take coal and market it, then that coal has to be as clean as possible, especially in a poor market, as it has been.

* * * * * * *

Q. Has the State of Kentucky or the Department of Mines and Miners ever received any kind of notice from these three gentlemen that they were building a house seat? Have they ever filed anything with the State of Kentucky?

A. No, no, we have not.

* * * * * * *

Q. Did you see anything on November 16th when you were there with Mr. Sorke and Mr. Williamson that would indicate to you that these gentlemen intended to do more than just push the coal over to the side and leave it sit?

A. Yes, with the loader there, and again, the fact that they were cleaning the coal. If they were going to dump it over the hill, or take it and even stockpile, there wouldn't be any purpose in cleaning it.

On the lefthand side of the pit, water -- there was some water that had drained over the coal, you know, and it had the mud and what you could not scrape off it with the grader blade that was on the little farm tractor, he had the broom sweeping the coal, cleaning off the remainder of that water and mud and so forth.

Q. In your experience, if a person was going to use that coal for house coal, would they take such action and use a pushbroom to clean the coal?

A. In my opinion, no.

Mr. Hollis stated that when he returned to the site on March 10, 1988, with Mr. Sorke, they spoke with Mr. Clarence Mills, and he identified the notes and communications made while communicating with Mr. Mills (Tr. 134-135, exhibit P-9). Mr. Hollis confirmed that he explained the mining law to Mr. Mills, and answered his questions concerning the taking of "house coal," requirements for obtaining mine permits, and the filing of mine plans (Tr. 138-144).

Mr. Hollis confirmed that the State of Kentucky has not received any notice from the respondents with respect to the construction of any house seat at the site in question, and that they have not challenged the issuance of the closure order. The closure order is still in effect, and the respondents would have to obtain a license in order to haul the coal or remove the closure order (Tr. 147-148).

On cross-examination, Mr. Hollis confirmed that if Mr. Clarence Mills had exposed the coal in the pit and simply pushed it aside, or shoved it over the hill, he would not be in violation of any state regulation (Tr. 150). Mr. Hollis confirmed that he observed no coal trucks at or near the site waiting to haul the coal away (Tr. 150). He also confirmed that anyone preparing a house seat who comes across a coal seam is not required to notify his department (Tr. 151).

Mr. Hollis stated that on March 10, 1988, Mr. Clarence Mills did not inform him that he had hired the respondents to build him a house seat, and that he was only interested in learning whether he could use the coal for his own purposes or moving out 250 tons or more (Tr. 153). He confirmed that the respondents told him to use the initials "S H M" for his state report, and that the respondents have not evidenced any desire to remove the coal from the site in question (Tr. 155).

Michael L. Hall, Investigator, State of Kentucky Natural Resources Academy of Special Investigations, testified that he has never investigated the S H M Coal Company, or any of the three respondents in this case. However, he confirmed that after receiving an anonymous call on November 18, 1987, he went to the site in question on November 23, 1987, and spoke with Mr. Clarence Mills. At that time, he had no knowledge that MSHA or the State Department of Mines and Minerals had investigated the site, but learned about this after speaking with Mr. Mills (Tr. 163).

Mr. Hall confirmed that he made notes of his conversation with Mr. Mills but did not have them with him at the hearing because he was notified about the hearing at 8:00 a.m. on the same day it was scheduled. However, he testified from his recollection, and confirmed that Mr. Mills informed him that he owned the property and intended to build a house seat at the site in question and that "they ran into coal" (Tr. 165). Mr. Hall stated that he explained the coal permit regulations to Mr. Mills and advised him that with the exception of extracting 250 tons for his personal use, he would need a permit to take more (Tr. 167). Mr. Hall confirmed that Mr. Mills was concerned about complying with the law and that he read him his Miranda rights, and that Mr. Mills wanted to know what he had to do to stay out of trouble (Tr. 167).

Mr. Hall stated that Mr. Mills informed him that Federal and State mining people had visited the site, but said nothing to him about the closure of the site (Tr. 168). Mr. Hall estimated that the pit contained approximately 370 tons of coal, and based on his examination of the site, he was of the opinion that it was a mine site (Tr. 170). He based this conclusion on the fact that coal was exposed, overburden was pushed out over the outslopes, and extensive overburden had been removed to reach the coal (Tr. 170).

On cross-examination, Mr. Hall stated that he did not believe Mr. Mills' assertion that he had a house seat built at the site in question. He confirmed that he did not charge Mr. Mills with any violation and did not seek any advice from

the county or the Commonwealth attorney. Mr. Hall also confirmed that no coal was removed from the site and no law which he enforces was violated on November 23, 1987 (Tr. 171).

Mr. Hall confirmed that he has recently built a house, and in all house sites he has observed, all that is necessary is to dig down to a clay surface rather than to go as deep as the site in question was dug (Tr. 174).

Respondent's Testimony and Evidence

Eugene Mills, testified that Mr. Clarence Mills is his uncle, and that sometime in July or August, 1987, his uncle asked him about the cost to build a house seat at the site in question, and although no price was agreed to, he and Mr. Curtis Smith, and Mr. James Harris worked together at the site to build a house seat for his uncle. Mr. Mills stated that they worked on the site periodically over a 3-month period (Tr. 179-182).

Mr. Mills stated that when Mr. Sorke and the two state mining inspectors come to the site, Mr. Sorke looked at the exposed coal and remarked that "it looks to me like you are mining coal." Mr. Mills stated that he informed Mr. Sorke that they were not mining coal and were building a house seat, and that if they were doing anything wrong, they should be taken to jail. Mr. Mills stated that Mr. Sorke replied that "I'll try to help you out" (Tr. 183).

Mr. Mills conceded that brooms were being used to clean off the coal when Mr. Sorke arrived at the site, and that the cleaning was necessary to remove the mud so the coal could burn. He stated that his uncle wanted the coal for his house, and he did not know the depth of the coal, but estimated that it was 8 inches deep (Tr. 184).

Mr. Mills stated that the respondents had no interest in the coal, and that he offered to push it aside for his uncle's use, but Mr. Sorke stated that it was "a shame to waste the coal," and that he would try to find a way for the respondents to remove it legally and take it to the foot of the hill. Mr. Mills stated that Mr. Sorke informed him that he would need a Mine ID number, and that he and the other respondents signed the required MSHA form (exhibit ALJ-1), but that it was not filled out when they signed it (Tr. 185). Mr. Sorke informed him that he would need a company name, and Mr. Mills stated that "S H M Construction sounds good to me," and that he advised Mr. Sorke to use that name if he needed to have one.

Mr. Mills also confirmed that Mr. Sorke did not fill out the form in his presence (Tr. 185-186).

Mr. Mills stated that no coal had been removed from the site, or even broken up and made ready to be moved, and that he hired no trucks, or had any trucks waiting to pick up the coal (Tr. 186). He denied that he and the other respondents had any interest in removing the coal, and confirmed that that they made no effort to remove the closure order. Although they discussed obtaining a mining permit, "there were more obstacles in our way, and it was just out of the question. In order to do that, . . . we were admitting to something that we weren't doing as far as mining" (Tr. 188).

Mr. Mills stated that the access road to the site was not wide enough to allow coal trucks to come and go. He confirmed that he has never engaged in any coal mining business or sold any coal (Tr. 190-191). He stated that he has constructed other house sites and that he generally has to cut out the side of a mountain in most areas where this has been done (Tr. 192).

Mr. Mills confirmed that he and Mr. Curtis Smith purchased two cases of explosives, and it was used for shooting ditch lines, fill stone, and rocks. This work was done at the same time that he was on his uncle's property (Tr. 193). Mr. Mills stated that no coal was ever broken or removed from the site, and he had no intention of removing it from the property (Tr. 194).

On cross-examination, Mr. Mills confirmed that in July and August, 1987, immediately preceding the work for his uncle, he was working on removing creek rock and that he was using the same equipment. The rock was shipped to Lexington and sold, and it was removed by hand and loader and trucked out. The rock business was not good, and he engaged in some farming on his father's and grandfather's land. The house seat for Mr. Mills was never completed, and none of the respondents were ever paid for the work (Tr. 196).

Mr. Mills stated that his uncle did not intend to sell the coal, and that he simply wanted it moved so the house seat could be completed. Mr. Mills confirmed that he had an oral agreement with his uncle, had worked for him in the past, and had expected to be paid for the house seat work (Tr. 200).

Mr. Mills stated that when he began the construction of the house seat he had no idea that any coal was at the site, and that his intent was to build a house seat (Tr. 202). When asked about his intentions with respect to the coal had

Mr. Sorke and the other investigators not arrived at the site on November 16, 1987, Mr. Mills responded "our intent was to break it up, pile it to the side, finish the house seat, get our money and try to get a new pair of shoes" (Tr. 203). He stated that when his uncle first asked him about constructing a house seat, they did not discuss the disposition of any coal which may have been found, and his uncle said nothing about stockpiling any coal or taking it for his own use. Mr. Mills confirmed that he would have to dig another 6 to 8 feet through the exposed coal in order to reach a suitable house seat (Tr. 203).

Mr. Mills stated that the words "Coal Company" were inserted on the MSHA Mine ID form by Mr. Sorke, and that he told Mr. Sorke that he and the other respondents were not a coal company, and that they were constructing a house seat for his uncle and simply ran into the coal seam (Tr. 206). Mr. Mills stated that Mr. Sorke replied "Don't give me that bull crap" (Tr. 207). When asked why he was cleaning the coal if he simply intended to bulldoze it aside so that his uncle could have it, Mr. Mills stated that his uncle wanted to burn it, and rather than breaking it up, he decided that the simple solution was to push it aside, and that was his intent (Tr. 209).

Mr. Mills stated that he "checked out" the price of low quality coal in 1987, and that it sold for $12 or $13, and that "wildcat" coal was $6 or $8, and he questioned how he would benefit by "trying to haul it off" (Tr. 208). He stated that his uncle came to the site after the coal seam was exposed, and asked if there would be a problem for him to break up and burn the coal (Tr. 209). Mr. Mills stated that his uncle wanted the house seat so that he could build a house for his son (Tr. 211). Mr. Mills confirmed that the son was 16 years old at the time the house seat was built (Tr. 213).

With regard to the training citations, Mr. Mills confirmed that the respondents "hired a safety man" and had some preliminary discussions with an individual who provides training for the Chaney Creek Coal Company (Tr. 223). Respondent Curtis Smith, who was present at the hearing, but was not called to testify, confirmed that while this was true, the respondents have not in fact taken any training (Tr. 223). When asked why an inquiry would be made about training, if as claimed by the respondents, that they were not engaged in a mining operation, Eugene Mills responded "We were confused, and we didn't know which way to go. Finally, we came to the point that we sought legal help" (Tr. 224).

Mr. Mills confirmed that some of the explosives in question were used to shoot some rock out of the road to the site in question, and that some was used to blast sandstone from the highwall. He also confirmed that the rest of the overburden was removed and pushed away with the bulldozer and highlift (Tr. 233).

Inspector Sorke was recalled in rebuttal, and he testified that he filled out the MSHA Mine ID form in question in the presence of Mr. Eugene Mills on the same day of his initial visit to the site on November 16, 1987, and that the respondents signed it at that time. Mr. Sorke explained that since the form was completed that day, he terminated Citation No. 3004621, that same day (Tr. 215). Mr. Sorke reiterated that the subject of the house seat was not discussed on November 16, and that this issue was first discussed on November 18, 1967 (Tr. 215).

Mr. Sorke confirmed that he wrote in the words "Coal Company" on the mine ID form, and that when he asked the respondents for a company name to insert on the form, they responded "Call us S H M Coal Company," and that is what he put on the form (Tr. 218). Mr. Sorke stated that he still does not believe Mr. Mills' assertion that the respondents were building a house seat at the site, and after hearing Mr. Mills' testimony that he inquired about the price of coal in 1987, Mr. Sorke remarked "I even believe it less now" (Tr. 219). Mr. Sorke had no knowledge with respect to the abatement of the training citations, and although he stated that the respondents may have since received training, he was not certain (Tr. 221-222).

Mr. Sorke explained the hazard ramifications connected with untrained persons who engage in strip mining, and the use of explosives. MSHA considers such untrained individuals to be hazards to themselves and to each other. Mr. Sorke confirmed that he based his unwarrantable failure finding on the fact that he believed that the respondents knew that they were required to be trained before beginning any mining (Tr. 228). He reiterated that he first spoke with Clarence Mills when he was with Mr. Hollis on March 10, 1988, and that he did not speak with him earlier because he had no reason to and did not know who owned the property (Tr. 228). Mr. Sorke stated further that when he left the site on November 18, 1987, after speaking with Eugene Mills, he assumed that the respondents would go ahead and obtain their training (Tr. 230).

Mr. Sorke confirmed that after Mr. Eugene Mills told him in November 18, that he was building a house seat for his

uncle, he did not contact the uncle at that time (Tr. 230). Mr. Sorke further confirmed that he had no knowledge that Mr. Hall had spoken with Clarence Mills until the day prior to the hearing in this case (Tr. 230). When asked if he were aware of the fact that Clarence Mills has been hauling building materials to the foot of the site in question, Mr. Sorke replied "No, but it will not surprise me in the least. If I was hunting a way out, I'd be hauling, too" (Tr. 231).

Mr. Sorke confirmed that although the equipment previously mentioned was at the site on November 16, 1987, the only work he observed being done was the sweeping of the exposed coal with pushbrooms. When he returned on November 18, the equipment had been removed from the site, and Mr. Sorke confirmed that he permitted the respondents to remove the equipment "as long as they didn't touch that coal" (Tr. 248).

Findings and Conclusions

The Jurisdictional Question

The definition of "coal or other mine" found in 3(h)(1) of the 1977 Mine Act is as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities (emphasis added).

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

> Finally, the structures on the surface to be used in or resulting from the preparation of the

> extracted minerals are included in the definition of "mine." . . . [B]ut it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3414.

The Joint Conference Committee continued along these same lines in stating that related structures, equipment or facilities, even though not yet in use in connection with mining activities, but which were to be used in connection with such mine related activities, are to be included in the definition of a mine. (Conference Rep. No. 461, 95th Cong., 1st Sess. (1977) reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT 1279, 1316 (1977)).

As a remedial statute, the Act has been given broad interpretation and has been found to apply to a broad spectrum of activities, including prospecting, assessing value of ore bodies and quarrying in one's backyard. Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980) (backyard rock quarry is within the definition of a mine); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (sand and gravel preparation plant is a "mine" within the meaning of the Act); Secretary of Labor v. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (January 1981), aff'd by the Ninth Circuit Court of Appeals, December 28, 1981, Cyprus Industrial Minerals v. FMSHRC and Donovan, 2 MSHC 1554 (digging of a tunnel to assess the value of talc deposits within the definition of a "mine").

The Commission has held that the actual extraction of minerals is not a precondition for jurisdiction to apply. See: Carolina Stalite Company, 3 MSHC 1759 (September 12, 1984); Secretary of Labor v. Alexander Brothers, 4 FMSHRC 541 (April 1982). See also Marshall v. Stoudt's Ferry Preparation Co., supra, and Marshall v. Tacoma Fuel Company, No. 77-10104-B (W.D. Va. June 29, 1981, holding that extraction is not required under the Act for coverage of preparation facilities.

In its posthearing brief, the petitioner cites the case of Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013 (9th Cir. 1976), a case arising under the Occupational Safety and Health Act relating to the growing of grapes.

In that case the court found that the activity of clearing land was a necessary part of the growing process, and that waiting until the grapes were planted to find that the operation was covered would be a meaningless gesture. Petitioner argues that in like manner, the clearing and preparation of land for the removal of coal is an integral and necessary activity in the extraction of coal, and that in a strip mining operation the majority of the work and effort involved in the mining operation is in such preparatory activities. I agree with the petitioner's position and I conclude and find that the preparation of the land is an integral and necessary process in the extraction of coal and that such activities constitute mining and are covered by the Act.

The thrust of the respondent's defense in this case is that it was not conducting a strip mining operation, and that it was engaged in clearing a site for the construction of a house seat. I find this contention to be lacking in credibility and it is rejected. For the reasons which follow, I conclude and find that the preponderance of the evidence establishes that the respondent was engaged in a strip mining operation and was in the last phase of land preparation prior to the actual removal of coal at the time Inspector Sorke arrived on the scene and issued the citations.

The evidence in this case establishes that two of the respondents, Eugene Mills and Curtis Smith, purchased explosives which were used in part to clear the site in question. Inspector Sorke found evidence at the site that explosives had in fact been used, and although some of the explosives were used for other purposes, Eugene Mills admitted that some of it was used to construct a roadway to the site and to blast sandstone from the highwall. Mr. Mills also admitted that the rest of the overburden was removed and pushed away with a bulldozer and highlift which were used at the site.

State of Kentucky Department of Natural Resources Special Investigator Thomas Spellman testified that he flew over the site in question and took aerial photographs of the site. Mr. Spellman, who had previously investigated over 1,000 illegal strip mining operations, testified that the site, which he described as approximately 122 feet long and 50 feet wide, had all of the characteristics of a surface mining operation, including a highwall, an exposed coal pit, and heavy equipment parked in the area.

Kentucky Special Investigator Michael Hall, testified that when he visited the site he observed the pit containing approximately 370 tons of exposed coal, overburden pushed over the

site outslopes, and he indicated that extensive overburden had been removed to expose the coal. He was of the opinion that the operation was a mine site.

Kentucky investigator George Hollis testified that when he visited the site in the company of MSHA Inspector Sorke, he observed an open and exposed coal pit and a highlift or loader, a small tractor, and a bulldozer. He also observed one of the respondents, James Harris, sweeping off the top of the exposed coal with a broom, and he believed that this was being done in preparation of breaking up and loading out the coal. He testified that if the respondents merely intended to remove and push the coal aside, there would be no need for cleaning it, and in his opinion the site was an illegal strip mining operation similar to many that he has observed during his experience as an investigator. He confirmed that he posted a state closure order at the site prohibiting the removal of any coal, and that the order is still in effect and would require the respondents to obtain a license before they could remove any of the coal.

Inspector Sorke, who visited the site on at least two occasions, testified that the respondents admitted that they had cleared the site, and he found evidence that explosives were used to shoot and create the highwall. He also observed a bulldozer, a tractor with a scraper pan attached to the rear, and a highlift at the site, and further observed that pushbrooms were being used to sweep the coal in preparation for its removal. He stated that the sweeping of the coal would be the last step in preparing it for removal. After taking measurements, he estimated that the coal pit was approximately 150 feet long and 50 feet wide, and that the exposed coal was approximately 2 feet in depth. He confirmed that the highwall was approximately 60 feet high at its center, and approximately 42 in height at each end. He further estimated that the coal pit contained approximately 488 tons of freshly exposed coal, and he believed that it could have been removed in one day. Based on his observations, and prior experience, Mr. Sorke concluded that the site in question was in fact a mine site.

Mr. Clarence Mills, the owner of the property where the site in question is located, did not testify in this case, and the record establishes that he has impaired hearing and is mute. At the request of the respondent's counsel, a hearing impaired interpreter was provided at the hearing, but counsel did not call Mr. Mills as a witness. The only witness testifying for the respondent at the hearing was Eugene Mills, one of the three individuals who cleared the site in question. None of the other partners in this venture testified.

Eugene Mills testified that the respondents never intended to mine any coal, and that they cleared the site in expectation of constructing a house seat for his uncle who wanted to build a house for his 16 year old son. Mr. Mills confirmed that he had an "oral contract" with his uncle to construct the site and that he has never been paid for the work. There is no evidence that a building or clearing permit was obtained for the work, and no proposed house plans were ever produced. Mr. Mills testified that when Inspector Sorke arrived at the site with the two state inspectors, he informed Mr. Sorke that the respondents were constructing a house seat. Mr. Sorke testified that when he initially visited the site on November 16, 1987, none of the respondents said anything to him about building a house seat, and that they told him this when he next returned on November 18, 1987. Special Investigator Hollis testified that when he visited the site on November 16, 1987, in the company of Mr. Sorke, none of the respondents mentioned anything about building a house seat. I find Mr. Sorke's testimony, corroborated by Mr. Hollis, to be more credible than that of Eugene Mills, and I conclude and find that Mr. Mills did not inform Mr. Sorke that he was constructing a house seat at the time Mr. Sorke initially visit the site, and that this contention on Mr. Mills' part came at a later time.

Investigator Hall, who interviewed Clarence Mills on November 23, 1987, testified that Mr. Mills informed him that he was having a house seat constructed on the site, but Mr. Hall did not believe him because he had recently constructed a house and found that it was unnecessary to dig as deep as the site in question was being dug for a house seat. Mr. Hall also testified that Mr. Mills informed him that although he intended to have a house seat constructed, the respondents "ran into coal," and Mr. Mills wanted to know what he could do to "stay out of trouble."

Investigator Hollis testified that he spoke with Clarence Mills on March 10, 1988, in the company of Mr. Sorke, and that Mr. Mills said nothing about hiring the respondents to construct a house seat. Mr. Hollis stated that Mr. Mills was only interested in knowing whether he could use the coal for his own purposes, and that he (Hollis) answered Mr. Mills' questions about removing "house coal" and the state requirements for obtaining a mine permit and filing mine plans.

Inspector Sorke, who spoke with Clarence Mills on more than one occasion before and after the site was closed, confirmed that Mr. Mills informed him that the respondents were constructing a house seat. Mr. Mills also inquired as to whether it would be legal to remove any of the coal from the

site, and Mr. Sorke explained MSHA's requirements to him. Although Mr. Sorke did not completely discount the possibility that a house could be constructed on the site in question, he obviously did not believe that this was the case. Mr. Sorke commented that "no one in their right mine would build a house on coal," and he stated that in his 10-1/2 years of experience he has never seen a house constructed on a site similar to the one in question. He also alluded to the fact that in prior instances when he has encountered illegal strip mines, he has been told "hundreds of times" that house seats were being constructed, but he never saw a house built at any of these sites. Mr. Sorke was also of the opinion that the site in question was not conducive to the construction of a house because of steep terrain, the manner in which the site was being cleared, and the fact that one would need a tractor or four-wheel drive vehicle to reach the site.

Mr. Eugene Mills further testified that he had no prior knowledge of the existence of any coal seam at the site in question, and that once the coal was exposed, the respondents only intended to remove it and pile it aside to finish the house seat (Tr. 202). He confirmed that he had no knowledge as to the actual depth of the exposed coal seam, and that in order to remove the coal to reach a suitable house seat depth, he would have had to dig another 6 or 8 feet, or "maybe more" (Tr. 184, 203). In my view, such further digging would create an even higher highwall, and I seriously doubt that anyone would have constructed a house at the site in question. Having viewed the site at the conclusion of the hearing, I found that access to the purported location of the house seat was extremely difficult, even on foot while walking up to the site along steep inclines.

Mr. Mills also confirmed that in July or August of 1987, and prior to the clearing of the purported house seat, the respondents were engaged in the business of removing creek rock from Mill Creek, using the same equipment, and that the rock was trucked to Lexington for sale on the open market (Tr. 194-195). I believe that the respondents intended to do the same thing with the coal which they were cleaning prior to its extraction, and that they would have done so had the inspectors not discovered the site.

After careful consideration of all of the evidence and testimony presented in this case, I reject the respondents contention that they were clearing the site for a house seat, and I conclude and find that they were engaged in a surface mining operation subject to the Act.

Interstate Commerce Issue

Article I, Section 8, Clause 3, of the Constitution gives Congress the power to "regulate commerce . . . among the several States." The U.S. Supreme Court has a long history of upholding Federal regulations of ostensibly local activity on the theory that such activity may have some affect on interstate commerce. Local activities, regardless of their size and their appearance as purely intrastate, may in fact affect interstate commerce if the activity falls within a class of regulated activity. See: Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1975). In Perez v. United States 402 U.S. 146, 155 (1971), the court held that where a class of activities is regulated and that class is within the reach of Federal power, the courts have no power to exclude "as trivial" individual instances of the regulated activity.

Section 4 of the 1969 Coal Act, which is applicable in this case, states as follows with regard to the mines subject to the Act: "Each 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."

The 1977 Mine Act is intended to assure safe and healthful working conditions for miners, and Congress clearly stated its findings and purposes in this regard in the 1969 Coal Act, as well as in the 1977 Act which extended jurisdiction of the Coal Act to all mining activities. The Congressional findings and purposes are set forth in section 2 of the 1969 Act, and they are equally applicable to all mines. Some of these findings and purposes are as follows:

* * * * * * *

> (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;
>
> (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal mines is a serious impediment to the future

> growth of the coal mining industry and cannot be tolerated;
>
> * * * * * * *
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal mine accidents or occupationally caused diseases unduly impedes and burdens commerce. [Emphasis added.]

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1012 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted intrastate affect commerce sufficiently to subject the mines to Federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976); Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary

of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation that had an MSHA "Mine ID" number and was inspected by MSHA was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982). See also: Southway Construction Co., 6 FMSHRC 174 (January 1984).

A gravel mine operator conducting activities solely within a state was held to be subject to the Act because its local mining activity had an impact on interstate market. Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied January 13, 1981; Scoria Products Branch, Ultro, Inc., 6 FMSHRC 788 (March 1984); Southway Construction Co., supra.

I conclude and find that the intent of the 1977 Mine Act, as well as the preceding 1969 Coal Act, as manifested by the legislative history, is that it is to be broadly construed so as to apply to all of the nation's mines as a class of activity which affects commerce, and the cited cases supports this conclusion. Accordingly, I further conclude and find that the respondent's mining operation is covered by the 1977 Mine Act and affects commerce within the meaning of the Act, and that the respondent is within reach of the Act.

The Respondent's Liability

In response to the petitioner's pretrial discovery requests, counsel for the respondents submitted a copy of a Commonwealth of Kentucky Certificate of Incorporation, and Articles of Incorporation, for a Corporation identified as the "SHS Corporation," and the registration agent is shown as James Harris, one of the individuals who along with Curtis Smith and Eugene Mills, were engaged in the mining activity in question in this case. However, I find no particular connection with this corporation and the work being performed by these individuals in connection with the mine site in question.

Exhibit ALJ-1 is a copy of an MSHA Mine Legal Identification form, and it reflects that Mr. Harris, Mr. Smith, and

Mr. Mills were partners operating the SHM Coal Company, under MSHA Mine Identification Number 15-16245. There is a dispute as to who prepared and filled out the form. Although Eugene Mills conceded that he and the other individuals signed the form, he claimed that it was not filled out when they signed it. He also claimed that after Inspector Sorke informed him that he needed a company name to put on the form, he told Mr. Sorke that "SHM Construction sounds good to me," and asked Mr. Sorke to use that name on the form. Mr. Sorke claimed that he filled out the form in the presence of Mr. Mills on the same day of his initial visit to the site on November 16, 1987, and that all three individuals signed it that same day. Mr. Sorke further claimed that Mr. Mills told him to use the name "SHM Coal Company," and that he inserted this name on the form.

The form in question, on its face, is dated November 16, 1987, the same day that Mr. Sorke issued Citation No. 3004621, citing the respondent with a violation of section 41.10, for not submitting the legal identity form to MSHA. Mr. Sorke explained that he terminated the citation that same day after the form was executed by the respondents, and he confirmed that he knew that no legal identify form was on file with MSHA before he visited the site. He also indicated that he had verbally issued all of the citations on November 16, but reduced them to writing and actually served them on the respondent on November 18, and that he did so because he had to include the mine identity number on the citations forms. I find Mr. Sorke's explanation to be reasonable and credible.

Irrespective of the information on the form, the evidence adduced in this case establishes that the three individuals in question were conducting a mining operation, and that they were doing so in association with each other as independent contractors. As such, they are clearly accountable and liable for their actions, including the violations and any civil penalty assessments for those violations.

Fact of Violations

Docket No. KENT 88-159

In this case the respondent is charged in a section 104(d)(1) "S&S" citation with a single violation of the training requirements of 30 C.F.R. 48.25(a), because Mr. Mills, Mr. Harris, and Mr. Smith had not received the new miner training required by this regulation. The respondent has not rebutted the reliable and probative evidence presented by the petitioner in support of the violation, and I conclude and find

that it establishes a violation. Accordingly, the violation IS AFFIRMED.

Docket No. KENT 88-104

In this case, the respondent is charged in a section 104(a) non-"S&S" citation with a violation of the mine operator notification requirements found in 30 C.F.R. 41.10. The reliable and probative evidence presented by the petitioner clearly establishes that the respondent did not file the required report in compliance with the cited regulation. Accordingly, I conclude and find that a violation has been established, and it IS AFFIRMED.

The respondent is also charged in a section 104(d)(1) "S&S" order with a failure to submit a training plan as required by mandatory training standard 30 C.F.R. 48.23(a)(3). The reliable and probative evidence presented by the petitioner establishes that the respondent did not file any training plan, and I conclude and find that a violation has been established. Accordingly, it IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury

> in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Unwarrantable Failure

The governing definition of unwarrantable failure was explained in Zeigler Coal Company, 7 IBMA 280 (1977), decided under the 1969 Act, and it held in pertinent part as follows at 295-96:

> In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

In several recent decisions concerning the interpretation and application of the term "unwarrantable failure," the

Commission further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more that ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

In Emery Mining, the Commission explained the meaning of the phrase "unwarrantable failure" as follows at 9 FMSHRC 2001:

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thought-lessness, or inattention. * * *

In Youghiogheny & Ohio Coal Company, 10 FMSHRC 603 (May 1988), the Commission, citing UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied sub nom. Bituminous Coal Operators' Assn., Inc., v. Kleppe, 429 U.S. 1405, held that while a significant and substantial finding is a prerequisite for the issuance of a section 104(d)(1) citation, there is no such requirement for the issuance of a section 104(d)(1) order.

The petitioner's posthearing brief does not address in any detail the alleged unwarrantable nature of the section 104(d)(1) citation and order, or the significant and substantial findings made by the inspector. The brief is limited to the following argument made at page 5:

> The failure of the respondent to obtain miner training and file mine plans prior to beginning mining was likely to result in a fatality because of the use of explosives, because of the lack of inspection of equipment used on the site, and because of the failure to use basic safety equipment such as hard hats and steel toe shoes on the site. The requirement of training and the filing of pre-mining plans are basic to the Federal Mine Safety regulatory scheme. Allowing respondent to mine without meeting these requirements defeats the purpose of the Act.

During the direct questioning and cross-examination of Inspector Sorke, no testimony was forthcoming with respect to his unwarrantable failure and significant and substantial findings, and he offered no reasons for making these findings. However, when called in rebuttal by the petitioner, and after questions from the court, Mr. Sorke testified as follows with respect to the hazard ramifications in connection with the lack of training (Tr. 225-227):

> Most people that do strip mining, and we've heard them say they are not strip miners, they are not miners, have had initial training for new hired miners. This alerts them to the dangers involved in this work, and what could happen to them during this type of work, considering the type of machinery they use, the area, and the control that they must provide for the highwall, and all those type things.
>
> Q. If you assume that this is a mining operation, what kind of hazards would you expect them to be exposed to that the training would help them in dealing with?
>
> A. Falling material from the highwall; as far as knowing how to properly operate the equipment, knowing that when you are using equipment

on elevated roadways and everything that berms are required; to keep over travel of equipment; knowing the condition the equipment is supposed to be in, and that's supposed to be handled; what records are required for that type of equipment.

Q. What about the use of explosives on that site?

A. Explosives are also in the training. Besides getting the training that I mentioned, they get first aid training for any accident that would happen on the site. They also would receive the proper use, handling and storage of explosives. If there is a site, and this one is not, where electricity is there, they get the proper use of electricity on a certain installation.

There are several areas; you know, I could keep going on and on and tell you things that they would get in training that just the normal construction worker has no idea about.

Q. What kind of accidents would you foresee as a result of working without that miner training?

A. Anytime that MSHA finds an untrained person, we consider him a hazard to himself and everybody there.

We feel like we could have a fatality, just from him not knowing the things about safety at a mining operation that he needs to know. That's why we always issue the G Order and remove those people until they have had this proper training.

When asked whether the withdrawal of the respondents pursuant to section 104(g)(1) of the Act was the reason for his significant and substantial and unwarrantable failure findings, Inspector Sorke responded as follows (Tr. 227):

Q. Is that why you also found the unwarrantable and the S & S in this case?

A. Part of it. I mean, there's a lot of things that you have to consider.

> Q. What other factors did you consider in issuing the unwarrantable?
>
> A. In an unwarrantable failure, you have to consider: one, that it's either a violation of mandatory safety health standards or not; and the two, the operator either knew or he should have know --
>
> JUDGE KOUTRAS: Is that your position here that knew or should have known this was a mining operation?
>
> THE WITNESS: Yes, sir. It's that they knew, not should have known.

Inspector Sorke testified that after his initial contact with the respondents at the mine site, he assumed that they would take the necessary steps to obtain a legal mine plan and to receive training, and he believed that the respondents may have visited another MSHA inspector at his home to obtain further information in this regard (Tr. 54, 71). At the hearing, the respondents who were present confirmed that they had made an initial contact with an individual who conducts training for another coal company, but that they did not avail themselves of any training (Tr. 223). Respondent Eugene Mills confirmed that he had a preliminary talk with a "safety man" who was hired, and when asked why he did not follow through with any training, he responded "everyone we talked to kept advising this and that. We were confused, and didn't know which way to go. Finally, we came to the point that we sought legal help" (Tr. 224).

Inspector Sorke confirmed that while it is common for mine operators who are operating illegal mines to have someone serving "in the woods as a watch-out," he was not aware of any such activity at the site in question. He also confirmed that in such situations, both he and the operator are apprehensive and scared, and that in this case the individuals at the site did not flee or attempt to run from the site (Tr. 215-217). Mr. Sorke confirmed that although several other individuals present at the scene "scattered and walked off the hill," the three named respondents stayed (Tr. 52). He also confirmed that no harsh words were spoken, and that he engaged in a friendly conversation with the respondents (Tr. 54). Further, aside from the inspector's mentioning the fact that one of his fellow inspectors had seen Mr. Harris on "some jobs," he had no

knowledge that any of the respondents had any previous connection with any other mining activities, or had ever been employed in coal mining (Tr. 103-104).

After careful review and consideration of all of the evidence in these proceedings, I cannot conclude that it supports any finding or conclusion that the violation concerning the respondent's failure to receive new miner training (48.25(a)), or the violation for the failure to submit a mining training plan (48.23(a)(3)), constitute unwarrantable failure violations. I find no aggravated conduct on the part of the respondents, and the inspector confirmed that he based his findings in this regard on the fact that the respondent "knew or should have known" about the cited training regulations in question. Further, although the inspector marked the citation and order "high negligence," no testimony was forthcoming as why he did this, other than his belief that the respondent "knew" about the training regulations. Under the circumstances, the inspector's unwarrantable failure findings ARE REJECTED AND VACATED.

With respect to the inspector's significant and substantial finding relating to the lack of new miner training (48.25(a)), there is no credible evidence showing that any of the individuals who were engaged in the mining activity in question were experienced miners, or had ever worked in the mining industry. Although none of the other respondents testified in this case, Eugene Mills confirmed that he had never before been involved in any coal mining (Tr. 191).

The intent of the new miner training regulations is to promote mine safety by insuring that new miners are trained in a number of safety and health subjects, including their new work environment, ground control, working around highwalls, hazard recognition, and the use of explosives in a mining environment. In enacting the withdrawal provisions for untrained miners pursuant to section 104(g)(1) of the Act, Congress recognized and declared that untrained miners are hazards to themselves and to others, and I conclude and find that the failure of new miners to receive the requisite training pursuant to the Act and MSHA's regulations is in itself a safety hazard.

The evidence in this case establishes that the respondents had engaged in work activities connected with the blasting and removal of overburden, the use of a bulldozer and other equipment, and the establishment of a 60 foot highwall. Mr. Mills confirmed that explosives were used to shoot the slate, stone, and large rocks from the highwall (Tr. 193). He also confirmed that the equipment was used to remove the overburden and push it over the steep hill and embankment adjacent to the site.

Under these circumstances, I conclude and find that the individuals in question were exposed to the hazards inherent in such activities, and that their lack of training presented a reasonable likelihood of an injury or accident of a reasonably serious nature. Accordingly, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

With regard to the inspector's significant and substantial finding in connection with the violation for the failure to file a training plan (48.23(a)(3)), I find no credible probative evidence to establish that the failure to file such a plan constituted a significant and substantial violation. The inspector's testimony in this case is totally lacking in any support for such a finding. Under the circumstances, the inspector's finding IS REJECTED AND VACATED.

In view of the foregoing findings and conclusions, including the rejection of the inspector's unwarrantable failure findings, section 104(d)(1) Order No. 3004623, November 16, 1987, citing a violation of 30 C.F.R. 48.25(a), for the failure to provide training for the three cited individuals in question is modified to a section 104(a) citation, with "S&S" findings, and IT IS AFFIRMED.

Section 104(d)(1) Order No. 3004624, November 16, 1987, citing a violation of 30 C.F.R. 48.23(a)(3), for the failure to submit a mine training plan is modified to a section 104(a) citation, with non-"S&S" findings, and IT IS AFFIRMED.

Section 104(a) non-"S&S" Citation No. 3004621, November 16, 1987, citing a violation of 30 C.F.R. 41.10, for failing to submit the required mine legal identity report IS AFFIRMED AS ISSUED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The evidence establishes that the mining operation in question was very small and was being operated by three individuals of unknown means and assets. The site has been closed by the State of Kentucky and MSHA's withdrawal orders. The individuals in question submitted no evidence with respect to the impact of any civil penalty assessments on their ability to pay such assessments. Aside from Mr. Eugene Mills, who testified in this case, there is no information as to whether or not the other individuals engaged in the mining activity in question are gainfully employed. Absent any evidence to the contrary, I

cannot conclude that the payment of the civil penalty assessments will adversely affect the respondents.

History of Prior Violations

The respondent has no known history of prior violations.

Gravity

With the exception of the new miner training violation, I conclude and find that the remaining two violations were non-serious. With respect to the new miner training violation, I conclude and find that it was serious.

Negligence

In view of my unwarrantable failure findings, I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Good Faith Compliance

As stated above, the mine site in question is closed, and the violations remain unabated because of that closure. Under the circumstances, I cannot conclude that the respondents have abated the violations in good faith, and I doubt very much that they will have any opportunity to do so, or ever intend to.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate in the circumstances of these proceedings:

Docket No. KENT 88-104

Citation No.	Date	30 C.F.R. Section	Assessment
3004621	11/16/87	41.10	$ 20
3004624	11/16/87	48.23(a)(3)	$ 20

Docket No. KENT 88-159

Citation No.	Date	30 C.F.R. Section	Assessment
3004623	11/16/87	48.25(a)	$150

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge