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

LANCASHIRE COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 89-147-R Order No. 2888399; 3/21/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 89-148-R Order No. 2888400; 3/21/89
	Docket No. PENN 89-149-R Citation No. 2891501; 3/21/89
	Docket No. PENN 89-192-R Citation No. 2891508; 4/17/89
	Docket No. PENN 89-193-R Citation No. 2891509; 4/17/89
	Prep Plant Mine ID 36-00838
	CIVIL PENALTY PROCEEDING
	Docket No. PENN 90-10 A.C. No. 36-00838-03537
	Prep Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	
v.	
LANCASHIRE COAL COMPANY, RESPONDENT	

DECISIONS

Appearances: Steven P. Fulton, James R. Haggerty, Esqs., Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania, for the Contestant/Respondent; Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the contestant (Lancashire) pursuant to section 105(d)

citations issued by MSHA mine inspectors. The civil penalty proceeding concerns proposals for assessment of civil penalties filed by MSHA seeking civil penalty assessments against Lancashire for the alleged violations of the mandatory safety and reporting standards which are the subject of the contested citations. Hearings were held in Pittsburgh, Pennsylvania, and the parties filed posthearing briefs which I have considered in the course of my adjudication of these matters.

Issues

An initial issue in these proceedings is one of jurisdiction. Lancashire contends that the mine in question does not not fall within the statutory definition of a "mine" subject to MSHA's jurisdiction, that the mine was placed in a "permanently abandoned" status by MSHA in September, 1988, and was not "reopened" or "reactivated" for purposes of coal extraction processing or production, and that MSHA's alleged failure to inspect or regulate other mines similarly situated constitutes illegal "selective enforcement" against Lancashire.

Assuming that jurisdiction attaches, the next issues presented include the following: (1) whether Lancashire violated the cited mandatory standards; (2) whether the alleged violations were significant and substantial (S&S); (3) whether the conditions or practices cited in the contested section 107(a) imminent danger order constituted an imminent danger; and (4) whether the section 103(k) order was properly issued.

Assuming the alleged violations are established, the question next presented is the appropriate civil penalties to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of the adjudication of these cases.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq.

2. 30 C.F.R. 77.200, 77.1712, and 45.4(b).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Tr. 16; exhibit ALJ-1):

1. The subject work site, Lancashire Coal Company Preparation Plant ("the work site") is located in Elmora, Cambria County, Pennsylvania and is owned by the Inland Steel Company ("Inland"), which has an office in East Chicago, Indiana.

2. Inland has referred to the work site as the #15 Preparation Plant.

3. The work site is adjacent to a sealed mine facility which is owned by Inland and which is known as the Lancashire Coal Company No. 25 Mine ("Lancashire Mine #25").

4. No coal has been mined at Lancashire Mine #25 since June 3, 1983.

5. Until June 3, 1983, the Lancashire Mine #25 was an active, producing underground coal mine with surface coal preparation facilities located adjacent to it on the site ("the Lancashire Coal Company Preparation Plant").

6. On April 17, 1986, the underground mine shafts were sealed by the operator. At that time, the mine operator was Inland Steel Coal Company.

7. Since the mine shafts were sealed, the surface facilities have been inactive with the exception of a small water treatment facility.

8. On September 30, 1986, the MSHA classification of the mine was changed to a surface facility as a result of the underground openings being sealed.

9. During fiscal years 1987 and 1988, the work site was inspected by MSHA as a surface facility. Prior to March 20, 1989, the last MSHA safety and health inspection was April 1, 1988.

10. On September 6, 1988, the Hastings Field Office of MSHA declared the work site permanently abandoned (Joint Exhibit 1).

11. MSHA's internal classification for the work site as of September 6, 1988 was CG status -- one of several MSHA classifications which are set forth and explained in the Department of Labor Mine Safety and Health Administration Coal Mine Safety and Health ("CMS & H") User's Guide for Coal's Management Information System, October 1, 1986 (Exhibit R-1).

12. As a result of the action it took on September 6, 1988, MSHA ceased inspection activity at the work site.

13. After September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal.

14. In late 1988, Lancashire sought bids from contractors to perform work dismantling and removing facilities and structural materials from the work site and reclaiming the area.

15. K & L Equipment Co., Inc. ("K & L"), owned by Kenneth Morchesky, was selected as the contractor and commenced work the week of February 20, 1989.

16. Purchase orders relating to the contract between Lancashire and K & L are set forth at Joint Exhibits 2 and 3.

17. On March 20, 1989, a fatal accident occurred at the work site. One of K & L's employees was killed during operations to raze a silo at the site.

18. On March 21, 1989, MSHA Inspector William D. Sparvieri, Jr. arrived at the work site to conduct an inspection. As part of his activities at the work site on March 21, 1989, Mr. Sparvieri issued the following citations and orders (exhibits R-2 through R-4):

a. Section 103(k) Order No. 2888399, 3:00 p.m.
b. Section 107(a) Order No. 2888400, 3:15 p.m.
c. Section 104(a) Citation No. 2891501, 3:30 p.m.

19. Order No. 2888399 was modified on March 27, 1989 at 7:45 a.m., and it was terminated on June 29, 1989, at 9:20 a.m.

20. Order No. 2888400 was terminated on June 29, 1989, at 9:30 a.m. Citation No. 2891501 was terminated on June 29, 1989, at 9:35 a.m.

21. Order Nos. 2888399 and 2888400, and Citation No. 2891501 were timely contested by Contestant.

22. On April 17, 1989, Inspector Sparvieri returned to the work site and served Citation Nos. 2891508 (1:55 p.m.) and 2891509 (2:00 p.m.) (exhibits R-5 and R-6).

23. Citation No. 2891508 was modified on May 1, 1989, at 9:50 a.m., and it was terminated on May 8, 1989 at 1:10 p.m.

24. Citation No. 2891509 was terminated on May 8, 1989 at 1:15 p.m.

25. Citation Nos. 2891508 and 2991509 were timely contested by Contestant.

26. The above-described orders and citations were served by a representative of the Secretary of Labor upon an agent of Lancashire at the dates, times, and places stated therein.

27. Lancashire stipulates that at the time Citation No. 2891508 was issued, it did not maintain in writing at the work site the information described in 30 C.F.R. 45.4(a). Lancashire denies that it had any obligation to maintain such information.

28. Lancashire stipulates that it did not notify the Coal Mine Health and Safety District Manager prior to commencing the work which is at issue in this case. Lancashire denies that it had any obligation to give such notification.

29. MSHA admits that apart from the regulations codified in 30 C.F.R. Part 77, no agent from MSHA provided any notification to Lancashire that it must notify the Coal Mine Health and Safety Health and Safety District Manager prior to commencing the work which is at issue in this case.

30. Assuming the accuracy of the proposed civil penalty assessments filed by MSHA, the parties adduce the following information concerning the six statutory civil penalty criteria found in Section 110(i) of the Act:

a. During the two-year period preceding the issuance of the subject citations, Lancashire had no violations.

b. Payment of the proposed penalties would not affect the operator's ability to continue in business.

c. The operator demonstrated good faith in attempting to abate the alleged violations after notification of them.

31. The parties stipulate to the authenticity and admissibility of each other's exhibits (with the exception of MSHA's Exhibits 7, 8, 9, 16, 25, 36, 37, and 38), but not necessarily to the exhibits' relevance nor to the truth of the matters asserted therein.

32. The Administrative Law Judge has jurisdiction over these proceedings. However, Lancashire denies that its activities at the subject work site are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

Bench Rulings

The presiding Judge made the following bench rulings during the course of the hearing in these proceedings:

1. MSHA's objection to the admissibility of an affidavit executed by retired MSHA Inspector Thomas J. Simmers (exhibit C-3), was overruled and denied, and the affidavit was received as part of the record (Tr. 19).

2. MSHA's objection to the receipt of any testimony regarding MSHA's enforcement actions concerning the Barnes & Tucker No. 20 Mine was overruled and denied (Tr. 9).

3. MSHA's motion to quash the subpoenas issued by Lancashire for the appearance and testimony of MSHA Inspector Niehenke and Brunatti (who appeared at the hearing) was overruled and denied (Tr. 9).

4. Lancashire's objections to the admissibility of several hearing exhibits offered by MSHA (see stipulation #31) were overruled and denied and the documents were received as part of the record (Tr. 24-41).

Discussion

The facts in these proceedings show that at approximately 2:15 p.m., on March 20, 1989, a fatal accident occurred at Lancashire's preparation plant when an employee of an independent contractor (K & L Equipment, Inc.) suffered fatal injuries while in the process of helping to dismantle a concrete coal storage silo. The victim, Robert Bell, had performed work cutting certain 5/8 inch steel reinforcing bands from the silo in question with a cutting torch. After completing this work, Mr. Bell left the area for a short time and returned to the silo area where he was next observed with the cutting torch kneeling at the base of the silo, where two or three of the steel reinforcing bands had been left intact. A section of the silo approximately 15 feet high and 30 feet wide collapsed, burying Mr. Bell in the debris which was in the silo. According to MSHA's accident investigation report, the debris included approximately 40 tons of coal which was in the silo.

As a result of the accident, MSHA Inspector William D. Sparvieri, Jr., who conducted the accident investigation, issued several citations to the contractor K & L Equipment, Inc., (which were not contested), and he also issued the contested citations and orders to Lancashire and served them at the mine office on Mr. Frank Falger, a supervisor who maintained an office at the mine site. The citations and orders in question are as follows:

Docket No. PENN 89-147-R. Section 103(k) Order No. 2888399, March 21, 1989, states as follows (exhibit R-2):

A fatal accident occurred on March 20, 1989, at the surface area of the mine site. This 103(k) order is issued to assure the safety of persons at the mine site. This area is closed to all persons except those needed to conduct an investigation. No persons are to enter this area and no work shall be performed in this area until the investigation is completed.

Docket No. PENN 89-148-R. Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, states as follows (exhibit R-3):

Structural damage has occurred in the raw coal silo and the screen house located next to the raw coal silo. Both structures at the present time are in an unstable condition and are a threat to persons in the immediate area. This condition was observed during a fatal accident investigation. To terminate this condition both structures need to be demolished. The operator shall submit in writing to MSHA a method describing procedures to be used to assure the safety of persons involved in the demolition of the two structures.

Docket No. PENN 89-149-R. Section 104(a) "S&S" Citation No. 2891501, March 21, 1988, cites an alleged violation of 30 C.F.R. 77.200, and the condition or practice cited states as follow (exhibit R-4):

The raw coal silo and the screen house were not maintained in good repair to prevent accident or injuries to employees. At the raw coal silo several steel re-enforcing bands were removed causing an unstable condition which resulted in a fatal accident on 3-20-89. Loose materials, metal sheeting, was hanging from the screen house.

The condition was a contributing factor in the issuance of an imminent danger Order No. 2888400, issued 3-21-89, therefore no abatement time was set.

Docket No. PENN 89-192-R. Section 104(a) Non-"S&S" Citation No. 2891508, April 17, 1989, and modified on May 1, 1989, cites an alleged violation of 30 C.F.R. 45.4(b), and the condition or practice is stated as follows (exhibits R-5 and R-5(a):

The operator did not maintain in writing at the mine office information required by section 45a (sic) of 30 C.F.R. for the independent contractor K & L Equipment Inc. at this mine. This violation was revealed during a fatal accident investigation. The accident occurred on 3-20-89.

Docket No. PENN 89-193-R. Section 104(a) "S&S" Citation No. 2891509, April 17, 1989, cites an alleged violation of 30 C.F.R. 77.1712, and the cited condition or practice states as follow (exhibit R-6):

The operator did not notify the MSHA District Manager prior to re-opening. An independent contractor, K & L Equipment Inc., was contracted for demolition work at the Lancashire Coal Company Preparation Plant. This violation was revealed during an investigation of a fatal accident that occurred on 3-20-89.

MSHA's Testimony and Evidence

MSHA Inspector William D. Sparvieri, Jr., testified as to his experience and training, and he confirmed that he conducted a fatal accident investigation on March 21, 1989. He explained what he found at the raw coal storage silo where the incident occurred, and the adjacent building which he identified as the screen house, and confirmed that some demolition work had been done at that structure (Tr. 41-48). He stated that the smaller of the two structures, which was the coal silo where the accident occurred, appeared to be unstable due to the fact that a large portion of its base was missing and the steel reinforcing bands which were around it had been cut and were hanging down, and the silo base did not appear to have any adequate support and was not in a safe condition. The screen house had pieces of tin and steel metal hanging from its sides, and since he did not know exactly how much work had been done on that structure to weaken its support legs, he was concerned about its safety (Tr. 50).

Mr. Sparvieri stated that after spending an hour at the site, he and fellow Inspector John Kuzar returned to their office so that Mr. Kuzar could make a phone call to their sub-district manager concerning the jurisdictional question raised by the mine supervisor who was at the site (Mr. Falger), and the contractor owner (Mr. Morchesky-K & L), who had raised the jurisdiction question during the investigation. Mr. Sparvieri and Mr. Kuzar then decided to issue a 103(k) order to insure the safety of the K & L personnel doing the demolition work around the structures in question, and they also decided to issue a section 107(a) imminent danger order because of the unstable condition of the silo and the screen house and to insure the safety of the personnel as well as other persons (Tr. 51). After receiving word from their sub-district manager Tim Thompson, they returned to the site and Mr. Sparvieri issued the two contested orders and a section 104(a) citation citing a violation of section 77.200, because he believed that the silo and screen house were no longer maintained in such a condition as to prevent an accident or injury to persons required to work around them. Even though the structures were being demolished, he nonetheless believed that they were required to be maintained in a safe condition pursuant

to section 77.200, "so that those people performing this work have less risk of injury" (Tr. 54). He believed that the loose materials hanging from the screen house should have been taken down, and that the bands which had been cut from the silo presented a question as to whether both areas were a safe location (Tr. 55). Since there were loose and overhanging materials above the people that were working on the structures, he did not believe they were being maintained in good repair to prevent these materials from falling on the people working below (Tr. 59).

Mr. Sparvieri confirmed that he based his "S&S" findings on the fact that the cited conditions could reasonably be expected to injure or kill someone if work were allowed to continue on both structures, and that the screen house overhanging materials, and the unstable silo, presented such hazards, particularly the silo, which had already collapsed, further weakening the structure (Tr. 60).

Mr. Sparvieri confirmed that he based his moderate negligence finding on the fact that the respondent knew that the conditions existed and should have known of the conditions by observation (Tr. 61). He identified a series of photographs of the structures and explained the conditions which he observed (Tr. 61-65; exhibits R-16 through R-26).

Mr. Sparvieri confirmed that after issuing the orders and citation on March 21, 1989, he returned to the site on March 29, 1989, after receiving a call from Mr. Falger on Sunday, March 26, 1989, informing him that the remainder of the silo had collapsed on its own, but that no one was injured and that he had posted a guard at the site. Mr. Sparvieri took additional photographs of the screen house, and parts of the silo had been cleaned up and removed from the area (Tr. 67, exhibits R-27 through R-30). He confirmed that during his intervening visits, the orders were modified to allow the operator and contractor to complete the demolition work (Tr. 69). He confirmed that Mr. Falger informed him that K & L had a contract with Inland Steel to remove the silo, the screen house, some smaller shed-type buildings, and some belts that led to the screen house and silo, and generally clean up the whole area (Tr. 70). Neither Mr. Falger or Mr. Morchesky ever told him that K & L had purchased the structures which were to be removed (Tr. 71). Mr. Sparvieri confirmed that he visited the site again on April 17, 1989, and after informing Mr. Falger that MSHA had decided that it had jurisdiction at the site, he issued two additional section 104(a) citations (Tr. 65-66).

Mr. Sparvieri stated that when he was initially assigned to conduct the accident investigation (exhibit R-7), Mr. Kuzar informed him that "there could be a jurisdictional question" (Tr. 71). Mr. Sparvieri then referred to MSHA's policy manual

(exhibit R-8) dated July 1, 1988, pgs. 6, and 9-10, which make reference to independent contractors, and he relied on item 3 dealing with the demolition of mine facilities, and he discussed the policy with Mr. Kuzar on March 21, 1989, when he issued the orders and citation (Tr. 72).

On cross-examination, Mr. Sparvieri confirmed that he had previously inspected demolition work performed by independent contractors, and that he referred to the policy because a jurisdictional question had been raised when he conducted the investigation of the accident. He conceded that the policy does not make reference to permanently abandoned mine sites, and he did not know when the facilities at the mine site were last inspected by MSHA. He assumed that the silo and screen house were in the same condition as they were at the time of his investigation, except for the silo bands which had been cut, and the support legs which were notched on the screen house. The materials which were hanging from the screen house appeared to have fallen off due to the conditions of the structure, and it did not appear that they were torn off (Tr. 75). However, he did not know if this were in fact the case (Tr. 76).

Mr. Sparvieri did not believe that one could simply look at the structures and come to the conclusion that they are in good repair while demolition work is taking place. He confirmed that the demolition work was stopped "midstream" because of the accident, and that this work would not necessarily leave the structures in bad repair. He conceded that the stripped pieces of steel could have occurred during demolition, and that when he returned on March 29, portions of the silo and other materials, such as the steel bands, were still there (Tr. 77).

Mr. Sparvieri confirmed that he estimated the height of the silo as approximately 65 feet, and that he did not measure the amount of the coal in the silo before or after the accident, and did not sample any of the debris which was in the silo (Tr. 80). Someone else estimated that the silo would hold 500 tons of coal, and he had no idea how much of the material in the silo was clay (Tr. 83). He confirmed that he noticed a brown tint in the material in the photographs, and he was told that the silo had a steel liner and that clay was used to backfill the area between the liner and silo block. When he returned and viewed the collapsed silo, he observed no steel liner in the silo, but did observe a color different from coal in some of the coal that had rolled out of the silo (Tr. 84).

Mr. Sparvieri confirmed that during his interviews, he was told that coal had to be removed with a front-end loader bucket to reach the accident victim, who was covered with coal, but he did not know how much coal had to be removed (Tr. 85). He also confirmed that he was told by people doing the demolition work that there was coal in the silo, and that they could see it

through an open window (Tr. 86). He estimated that the silo was one-third full of coal through observations through the silo opening, and the materials which were outside of the silo (Tr. 88). Lancashire's counsel agreed that the materials in the silo were enough to inundate the accident victim and suffocate him, and he conceded that there is a nexus between the materials in the silo and the death of the victim (Tr. 89).

Mr. Sparvieri confirmed that his accident report reflects that the mine operator did not notify MSHA that the mine was to be reactivated (Tr. 90). He also confirmed that K & L had done some demolition work at the Barnes and Tucker No. 20 preparation plant, and that Mr. Falger told him that this work had been done but that MSHA did not inspect that site (Tr. 92). He confirmed that he would inspect such a site if he were assigned to inspect it (Tr. 92). He also confirmed that once a mine site has been declared permanently abandoned, MSHA's duty to inspect it ceases, and he was not familiar with Lancashire's site prior to the accident (Tr. 94, 96).

Mr. Sparvieri confirmed that the silo and screen house were used in coal preparation, but he did not know any of the details. He confirmed that the actual mine opening which had been sealed was approximately a "few hundred" feet from the accident site, but that he did not know for certain (Tr. 98). He confirmed that during his conversations with Mr. Falger and Mr. Morchesky, they referred to the silo as a "coal storage silo," and that he was under the impression from the persons he talked to during his investigation that the silo was used at one time to store coal, and that no one ever told him that materials other than coal were added to the silo (Tr. 100). Lancashire's counsel stated that "there's no dispute that there was coal stored in there at some point" (Tr. 102).

Mr. Sparvieri confirmed that Mr. Falger informed him that K & L had the salvage rights to the materials from the structures which it was under contract to demolish, but did not state that K & L had purchased the property where the structures were located from Inland Steel (Tr. 104). He further confirmed that he was informed of the procedures followed by K & L in doing the demolition work by Mr. Morchesky and the people doing the work at the site, and that the silo bands were removed to weaken the structure as part of the plan to demolish it (Tr. 108). He was aware of no MSHA standard requiring MSHA's approval of a demolition plan, and he confirmed that the modified order permitting K & L to continue its work under "controlled conditions" was issued by another inspector (Tr. 110).

Mr. Sparvieri expressed his views on how the silo structure should have been demolished, and he confirmed that he could observe from a safe distance that some work had been done on the legs of the screen house with a cutting torch, and several K & L

employees informed him that they had notched the legs sometime during the day of the accident to weaken them so that the structure could be pulled down (Tr. 113-114).

Lancashire's Testimony and Evidence

Francis Falger, testified that he is employed by Inland Steel Company, Lancashire Coal Company, and has been so employed for 30 years. He explained that he was employed by Barnes & Tucker since 1960, and that when the property changed ownership from Barnes & Tucker to Inland Steel, he stayed on as an employee of Inland Steel. He stated that Barnes & Tucker operated several mines and cleaning plants, and the property was sold to Inland Steel in 1970, and Barnes & Tucker continued to manage it for Inland Steel for a fee. Inland Steel then closed the mine on November 13, 1981, and took the management from Barnes & Tucker. Inland reopened the mine in February, 1982, and started coal production, but then ceased production on June 3, 1983. He is the only employee at the site, and coal was last extracted on June 3, 1983, when the shafts were sealed sometime in 1984 (Tr. 137). He confirmed that his title is "supervisor" and that no coal milling or preparation takes place at the site, and that prior to the sealing of the shafts, MSHA conducted inspections at the site. The mine was placed in a permanently abandoned status in September of 1988, by Mr. Kuzar, and he explained how this was done (Tr. 138-140).

Mr. Falger confirmed that MSHA did not inspect the site from the time it was permanently abandoned until the time of the accident, and that Inland Steel and Lancashire took no actions to resume milling or coal preparation since the time it was abandoned other than providing security for the site, and treating the water pursuant to the requirements of the Pennsylvania Department of Environmental Resources (Tr. 141). He confirmed that he negotiated the demolition contract with K & L, and that the remaining new silo and preparation plant which were not torn down will eventually be torn down after the mortgage which is due in 1991 is paid (Tr. 143). He confirmed that Inland Steel intended to reclaim the property, and that demolition of the existing structures is one step in that direction (Tr. 143).

Mr. Falger confirmed that Mr. Morchesky represented K & L during the demolition contract negotiations, and he explained the scope of some of the work covered by some of the purchase contracts (Tr. 143-145). Mr. Falger confirmed that he did not notify MSHA when he entered into the contract with K & L "because we're permanently abandoned, and there was no coal production" (Tr. 149). He informed Mr. Morchesky that K & L's demolition work "does not come under MSHA" because the mine was permanently abandoned and that K & L's prior demolition work at the Barnes & Tucker No. 20 Mine was "the same thing" and was "not under MSHA"

(Tr. 150). Mr. Falger confirmed that the demolition work performed by K & L at the time of the accident was not for the purpose of reopening the mine or producing coal (Tr. 150).

Mr. Falger stated that prior to the accident, nothing was stored in the silo which was being razed, that it was constructed in the late 1950's or early 1960's, and when the new preparation plant was built in 1971, the silo was not in use. Mr. Falger denied ever telling Mr. Morchesky or any of his employees that coal was stored in the silo. He stated that MSHA had not inspected the silo or screen house for 3-years prior to last September, and when the site was inspected no one physically examined the structures which were located about a 5 to 10 minute walk from the new preparation plant (Tr. 152).

Mr. Falger stated that Mr. Sparvieri and Mr. Kuzar came to the site after the accident on the morning of March 21, 1989, and when he informed them that he did not believe that MSHA had jurisdiction because the mine had been permanently abandoned by MSHA, Mr. Kuzar responded "I don't know whether we do or not, but we're going to start our investigation anyway until we find out what's going on" (Tr. 154). Mr. Falger confirmed that he cooperated with the inspectors and explained the work that was being performed.

Mr. Falger stated that he observed the debris which was in the silo which collapsed, and he described it as having a "yellow, brownish cast to it," and that this did not surprise him because the bottom of the silo was lined with clay. He confirmed that Lancashire never intended to sell anything that was in the silo, that it had no commercial value, and he described it as "junk." He stated that if the material were run through a cleaning plant, "all that was there you can't come up with much" (Tr. 155). He could not recall whether any of the inspectors asked him about the contents of the silo (Tr. 155).

Mr. Falger stated that the closed Barnes & Tucker No. 20 Mine was located a "ten minute drive" from the accident site, and he confirmed that demolition work had been performed by K & L at that site within the last 3 years, and that "they had the same set up as we did." He explained that it was an underground slope mine and that the shafts and slope were sealed, but that he was not there when the work was being performed, and did not know if MSHA inspected the demolition work. However, he stated that MSHA Inspector Leroy Niehenke told him that he was at that site when the demolition work was taking place but did not inspect that work, and that he was there only to "check the electrical part of it" and was told by his boss not to go to the area where K & L was doing the actual demolition, and that he did what he was told (Tr. 157).

On cross-examination, Mr. Falger confirmed that he agreed to sell Mr. Morchesky all of the scrap material removed from the site after the structures were torn down for $55 a ton (Tr. 161). He confirmed that there was coal in the razed silo, but denied that the coal was stored there and that "all the coal that was in was just stuck on the bottom in clay," and that it was "whatever was left in the silo whenever they cleaned it out" (Tr. 165). He stated that the coal was left in the silo 20 years ago, that it was coal which was processed at the new preparation plant which was built in 1971, and that it was extracted and processed prior to 1983 (Tr. 165).

Mr. Falger confirmed that at the time Mr. Kuzar called him to inform him that the mine would be placed in a permanently abandoned status, he did not know that the demolition work would be done and no contract negotiations were ongoing with K & L at that time. He did know that the entire area would have to be reclaimed and the structures torn down, but that Inland Steel intended to hold the property until the leasing arrangement expired in 1991 (Tr. 176-177). Absent any buyers, he assumes that the new preparation plant will be torn down at that time (Tr. 179).

John Emerick, President, Coal Utilities Corporation, testified that he is a graduate of the Penn State University, and that he is a professional engineer in the State of Pennsylvania, and has been since 1961. He stated that he has been involved in the coal industry for 33 years, and has done surface mining reclamation work, including work for Inland Steel. He was familiar with the site in question, and was involved in the design of the silo when he worked as chief engineer for Barnes and Tucker from 1957 to 1969. He stated that the silo was constructed in approximately 1959, and he explained its construction. He stated that the silo could hold 1,100 tons of coal at full capacity, and confirmed that he visited the site as a consultant for Inland Steel shortly after the accident. He observed the debris which came out of the silo, and he described it as "a mixture of clay and coal," and he was not surprised with this mixture because all of the coal cannot be removed because of compaction inside the silo (Tr. 186).

In response to further questions, Mr. Emerick stated that the silo was used to store raw coal when the cleaning plan was not operating, or when the cleaning plant was processing more coal from the mine than it could handle (Tr. 186).

Supervisory MSHA Inspector John Kuzar confirmed that the Barnes & Tucker No. 20 Mine was located in his enforcement district, and that he was aware of the demolition work there in 1986 and 1987. He knew that Mr. Morchesky was doing the reclamation work at that site, but was not aware that he owned the K & L

Company. He explained that during part of the time the demolition work was being performed, his office was responsible for the mine, but that another supervisor from the Ebensburg office was responsible for it for part of the time. He stated that he had occasion to visit the site with another inspector who was checking the sealing of the shafts (Tr. 190-193). He confirmed that inspectors from his office were at the site to insure that the slope shafts were being sealed according to the sealing plan, and that during this same time, demolition work was taking place at the site (Tr. 194). When asked why the inspectors would not inspect the demolition work, Mr. Kuzar responded "probably because they weren't assigned to inspect the demolition work" (Tr. 195).

Mr. Kuzar further explained that he knew that some inspectors had looked at some of the Barnes & Tucker demolition work, but were under the impression that Mr. Morchesky had purchased the area where the demolition work was taking place for $1. Under the circumstances, they were of the opinion that MSHA did not have jurisdiction over that particular area (Tr. 197). He further explained that until the day before the hearing in these proceedings, he believed that MSHA lacked jurisdiction if the site were being reclaimed through state grants, or if the mine operator went out of business and sold the land (Tr. 198). His present understanding is that ownership of the property does not matter (Tr. 211). He now believes that MSHA was in error for not inspecting Mr. Morchesky's demolition work at the Barnes and Tucker No. 20 Mine (Tr. 212).

Mr. Kuzar explained the circumstances under which the orders in question were modified to allow the demolition work to proceed safely, and he confirmed that he was at the site to observe the screen house when it was taken down. He further confirmed that the silo came down "on its own accord" and that the screen house had to be pulled down with front-end loaders (Tr. 217, 222).

On cross-examination, Mr. Kuzar confirmed that the method used to tear down the screen house once the orders were issued did not differ significantly from the method which K & L intended to use prior to the accident (Tr. 227). He also confirmed that the screen house structure was difficult to tear down and that it "was pulled in every direction you could possibly pull it. They couldn't get it to come down. And when it came down, it didn't come the way they were planning on it coming down" (Tr. 227). Even though the structure could not be readily pulled down, the hazard presented concerned the workers who were exposed to materials hanging above them while they were engaged in the work of cutting the legs of the structure (Tr. 227).

MSHA Inspector Leroy Niehenke, testified that he is an electrical inspector, but also conducts regular mine inspections,

and he confirmed that Mr. Kuzar and Mr. Biesinger are his supervisors (Tr. 232). He confirmed that once a mine has been declared permanently abandoned, MSHA's duty to inspect it ceases. It was his understanding that the mine operator has a duty to reclaim and tear down the structures left at an abandoned mine. He confirmed that he was aware that a contractor was performing demolition work at the Barnes & Tucker No. 20 Mine during 1986 and 1987, but did not know at that time that it was Mr. Morchesky or K & L. The contractor was tearing down the preparation plant, and it took a year to complete the work. Although he performed at least one inspection at that site, he did not inspect the demolition work of the contractor because Mr. Biesinger told him not to. Mr. Niehenke denied that Mr. Biesinger told him that MSHA had no jurisdiction over the demolition work, and stated that Mr. Biesinger gave him "no reason whatsoever" for not inspecting the work (Tr. 235).

Mr. Niehenke confirmed that once a mine has been declared permanently abandoned, MSHA would not inspect the facility unless the operator took some action that indicated that he intended to resume coal production and processing (Tr. 235). He confirmed that he had issued citations at the No. 24-D Mine portal while shaft sealing was in progress, and that the mine at that time was "apparently" not permanently abandoned and the operator was in the process of sealing the shafts (Tr. 236). In his experience, he was not aware of any time that MSHA has asserted jurisdiction at an abandoned mine solely because of demolition work taking place at such a mine (Tr. 237). He confirmed that after the accident in question, he went to the site and spoke with Mr. Falger and agreed with his assertion that he had previously not inspected the demolition work at the Barnes & Tucker No. 20 Mine. He confirmed that he told Mr. Falger that he had not done so "because I received instructions from my supervisor not to inspect it" (Tr. 237).

On cross-examination, Mr. Niehenke confirmed that his prior inspection at the No. 20 Mine was limited to an electrical inspection, and although electrical work may have taken place "around" the demolition area, it was not taking place "in the immediate area" (Tr. 238). He stated that it was his understanding that pursuant to MSHA's policy manual, if demolition work is being done at a mine which has been permanently abandoned, and MSHA was aware of it, the mine would be removed from its permanently abandoned status and placed in an active status. He confirmed that this policy was in effect even before the accident in question (Tr. 240).

Kenneth Morchesky, confirmed that he is the owner of K & L Construction, and that he also owns Laurel Land Development, which is a surface mining operation, and Cambria Metals Processing, which is a trucking business. He confirmed that he purchased the Barnes & Tucker site to "make my money from the

salvaging of the good items and to scrap the rest" (Tr. 247). He confirmed that he contracted to do the work at issue in this case, and that he was "to raze the silo in conjunction with removing certain pieces of junk at Inland Steel," and that this work was covered by purchase orders (joint exhibits 2 and 3). He confirmed that he knew about MSHA and the need for an MSHA ID number, but did not believe that he needed an ID number for the demolition work because he had done similar work at the No. 20 Mine without a number, and Inland Steel advised him that his work would not be covered by MSHA. Mr. Morchesky assumed that this was the case, and that he would be covered by OSHA (Tr. 249). Mr. Morchesky believed that MSHA was aware of his work at the No. 20 Mine because an inspector whose name he did not recall came to the site, and after a short discussion, he left.

Mr. Morchesky confirmed that he was served with citations in connection with his demolition work in question, and although he initially contested them, he paid the proposed civil penalty assessments because "it was cheaper to pay them rather than fight them" (Tr. 254, exhibit C-2). When asked about his prior statement in his contest letter of May 31, 1989, exhibit C-2, that an MSHA inspector at the No. 20 Mine site in 1986 informed him that a "scrap" job was not covered by his inspection duties, he conceded that the inspector made no such statement, and that he simply assumed that MSHA would not inspect his work because the inspector left and did not inform him that he would conduct an inspection (Tr. 257). He confirmed that the inspector did not specifically inform him that the "scrap" job was not covered by MSHA (Tr. 259). Mr. Morchesky denied that he told Mr. Falger about his conversation with the inspector, but that he "probably" did so when he was negotiating the demolition contract, and "probably told him that I wasn't covered by an MSHA inspector out there" (Tr. 260).

Mr. Morchesky confirmed that citations were issued to his Laurel Land Development Company in 1986, but denied that any of these citations were for demolition work that he was doing at the No. 20 Mine (Tr. 262-268). He confirmed that he purchased "certain pieces" from Barnes & Tucker, including an "old portal" and the ground where his office was located (Tr. 268). He also confirmed that MSHA inspected the mining work he was performing with his Laurel Land Development Company in the area of the No. 20 Mine, but that MSHA was "never around the stuff that was not affiliated with mining" (Tr. 270). He stated that he told Mr. Falger that the No. 20 Mine was not inspected and that his work for Lancashire "should be under the same rules and regulations." When Mr. Falger showed him the letter confirming that the site had been permanently abandoned, Mr. Morchesky said he stated to Mr. Falger "I wasn't inspected over there, I shouldn't be inspected by MSHA over here" (Tr. 271). He also stated that if he knew he would be regulated by MSHA, he would not have taken

the demolition job because "I just don't want to be under MSHA's guidelines and what have you" (Tr. 271).

Mr. Morchesky confirmed that there was coal in the area of the silo, as well as in the silo, but he did not know how much. He stated that he could see some coal through a crack in the window, and that it appeared to be up to that level. He anticipated that once the silo was weakened and started to topple, the weight of the screen house would crush the rest of it (Tr. 275-276).

Retired MSHA Inspector Thomas J. Simmers, who was unavailable for the hearing because of health reasons, executed a sworn affidavit, and it was received in evidence (exhibit C-3). It states as follows:

> 1. I worked for the Mine Safety and Health Administration (MSHA) for approximately 18 years. I retired from MSHA in April 1987.
>
> 2. I worked as an MSHA inspector for the last 15 years of my employment with MSHA. During that 15 year span I worked out of numerous field offices including the field offices in Hastings, PA; Johnstown, PA; Indiana, PA; Clearfield, PA; and Ebensburg, PA. Thus, I am familiar with MSHA inspection procedures.
>
> 3. Based on my experience, once a mine has been declared permanently abandoned, MSHA inspections of the facility cease. Inspections would not occur again at a facility that had been declared permanently abandoned unless the operator took action that indicated that it intended to resume production or processing of coal. I am unaware of any instances during my employment with MSHA when a mine that had declared (sic) permanently abandoned was inspected by MSHA when the operator did not take such action.
>
> 4. I recently had stomach surgery and am unable to attend a hearing in Pittsburgh, Pennsylvania, on October 24, 1989, due to my health.

In response to certain interrogatories, MSHA confirmed that retired Inspector Simmers and a State mine inspector had inspected the Barnes & Tucker No. 20 Mine in 1986-1987, and knew that Mr. Morchesky was performing work at that site, but did not know that he was doing business as the K & L Equipment Company. MSHA further confirmed that Mr. Simmers and the State inspector were under the impression that Mr. Morchesky had purchased the No. 20 preparation plant structure for $1 and was planning to reclaim the area, and that under these circumstances, they concluded that neither MSHA or the state had jurisdiction to inspect

Mr. Morchesky's operation. MSHA further confirmed that Inspector Davis also had knowledge of Mr. Morchesky's work at the No. 20 Mine, but did not believe that an MSHA inspection of his operations was appropriate because Mr. Morchesky had purchased the entire plant facility.

In response to my question as to whether or not the purchase of the old structures which were being demolished by Mr. Morchesky at the time of the accident made any difference with respect to MSHA's enforcement authority, MSHA's counsel stated that "it apparently doesn't make any difference" (Tr. 162).

Findings and Conclusions

The Jurisdictional Question

Section 3(h)(1) of the Mine Act, 30 U.S.C. 802(h)(1), defines "coal or other mine" as follows:

(h)(1) "[Co]al or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or 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).

Section 3(h)(2) of the Act, 30 U.S.C. 802(h)(2), provides the following definition of a "coal mine:"

(2) For purposes of titles II, III, and IV, "coal mine" means an 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 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.

Lancashire argues that once MSHA determines that a facility is a "coal or other mine," it is required to periodically inspect it, and has no discretion to discontinue these inspections. Since MSHA placed the mine in a permanently abandoned status in September 1988, Lancashire concludes that it correctly determined that it was no longer a mine subject to MSHA jurisdiction. By permanently abandoning the mine, Lancashire concludes further that MSHA made a determination that it was no longer a "coal or other mine" which would be required to be inspected periodically under the Mine Act.

Lancashire's argument seems to suggest that once MSHA places a "coal or other mine" in a permanently abandoned status, it has also permanently abandoned its enforcement authority or jurisdiction to resume inspections at the mine at anytime. I reject any such notion. MSHA's abandonment of the mine was based on its determination that all active coal mining activities had terminated, the mine shafts had been sealed, and there was no indication that active mining would resume in the near future. In my view, by placing the mine in a permanently abandoned status, MSHA, in its discretion, simply made a determination that the mine was no longer required to be inspected periodically.

MSHA's determination not to continue with its inspections at the mine site did not in my view, remove the mine from the statutory definition of "coal or other mine" found in the Mine Act. At the time that the inspections in question were conducted, and the violations were issued, the mine structures and equipment which remained from previous mining activities, including the new preparation plant, and the old plant silo and screen house, were still at the site and were clearly structures, facilities, equipment, or other property, used in, or resulting from, the work of coal extraction and preparation. Further, the land where the

mine is located was used in or resulted from the work of coal extraction and preparation.

During oral arguments at the hearing, Lancashire's counsel agreed that the silo and screen house structures were at one time part of the preparation plant facilities, and he did not dispute the fact "that the building resulted from preparation of coal" (Tr. 129, 181). Lancashire's contention is that once the mine operator ceased using these structures for coal preparation, MSHA could not resume its inspection of the mine site unless active coal production or preparation activities resumed. While it seems clear to me that at the time of the disputed inspections, the mine site fell clearly within the statutory definitional language of "coal or other mine," the question of whether or not the work activities which were taking place fell within the framework of the cited mandatory standards and can support the contested violations are matter to be determined by the facts on their individual merits.

In view of the statutory definitions of "coal or other mine" and "coal mine," i.e., "lands, structures, facilities, equipment, and other property used in, or resulting from mineral extraction . . . and/or the work of preparing the coal so extracted," it would logically follow that a preparation plant, or other supporting structures such as the silo and screen house in question, may reasonably be considered an important part of the coal extraction and processing scheme. When such structures are being constructed for the purpose of actively mining coal, MSHA has the authority to regulate such activities. Conversely, when such structures are being demolished for the purpose of removing them from an abandoned mine site, and there is no intent to replace them with new structures, or to resume the active mining of coal, one may logically conclude that these structures will no longer be used for coal extraction or coal preparation. However, these structures are nonetheless structures which are the result of the prior active mining of coal, including extraction and processing, and fall within the statutory definition of coal or other mine.

Lancashire's posthearing arguments at page 15 through 20, that the mine structures in question did not fall within the statutory definition of "coal or other mine" are rejected. Lancashire's reliance on former Judge Jon D. Boltz's April 21, 1981, decision in Kaiser Steel Corp., 3 FMSHRC 1052 (April 1981), in support of its statutory definitional analysis and conclusion that the mine structures in this case bear no rational relationship to "coal preparation" is likewise rejected. The Kaiser Steel Case, which was not appealed to the Commission, and does not reflect a binding Commission decision on me, concerned an impoundment dam located near a mine site, and whether or not the water from the dam "is used or to be used" in the "work of preparing the coal."

Although it is true that the old Lancashire silo and screen house preparation plant facilities which were being demolished at the time of the inspections in question were not currently being used in connection with any coal preparation work, and had not been used for years, the fact is that the silo was at one time used to store coal processed by the plant, and the screen house was used as well as part of coal preparation and processing. Under the circumstances, it seems clear to me that these old structures were in fact the result of coal preparation and processing, as those terms are normally understood. Indeed, since the coal from the previously active underground mine was processed through the old plant facilities, one may reasonably assume that a nexus existed between the coal being extracted from the underground mine, and the coal being prepared and processed through the surface preparation facilities and structures. The fact that the old silo and screen house had not been used since 1971, as testified to by Mr. Falger (Tr. 168-170), is immaterial. The applicable statutory definition of "coal or other mine" under which jurisdiction attaches in this case is not related to any time factor, and its application has consistently been given its broadest possible interpretation by the courts as well as the Commission.

In a case under the 1969 Coal Act, Jones and Laughlin Steel Corporation v. MESA, Docket No. PITT 76 x 198, former Chief Administrative Law Judge Luoma of the Department of the Interior decided on February 22, 1977, that a refuse pile on the mine operator's land was part of a coal mine and subject to the Act. The refuse pile consisted of material taken directly from the mine, such as waste from roof falls, construction material, etc. It apparently was largely slate but contained some coal. The refuse pile was approximately 50 years old and had not been used since 1967. Judge Luoma concluded that the refuse pile was a surface area of the mine, since it was "composed of material which resulted from, the work of extracting coal." (Emphasis added).

Alexander Brothers, Inc., 4 FMSHRC 541 (1982), another case arising under the 1969 Coal Act, involved the reclamation of coal from a refuse pile created during the operation of a mine which was closed in 1967 after being operated from the 1930's. The pile contained coal, rock dust, garbage, timber, wood, steel, dirt, tin cans, bottles, metal and general debris. Alexander Brothers removed and screened the materials to market approximately 20 to 25 percent of the coal which was in the pile and sold it to various brokers. The Commission determined that Alexander Brothers was engaged in the work of preparing coal and that the fact that it had nothing to do with the extraction of coal, and that the work in removing the debris from the coal differed from the ordinary preparation plant did not remove it from the jurisdiction of the Act.

Westwood Energy Properties, PENN 88-42-R, etc., decided in part by the Commission on December 20, 1989, involved a culm bank or refuse pile created as the refuse product of an underground coal mine and its preparation plant which operated from 1913 to 1947, and the preparation plant was destroyed and its remains became part of the refuse pile which was located on land owned by Westwood. After the underground mine was closed, another company operated a "fine" coal plant, separating fine coal from the waste material and selling it, and this operation was inspected by MSHA or its predecessor agency. Westwood constructed an electrical generating facility on the land in 1986, and it became operational in 1988. Westwood engaged a contractor to remove wood, metal, and other waste materials from the bank, and the coal materials from the bank were further processed and burned to produce steam which generated electricity by steam driven turbines, and the electric power which was produced was sold by Westwood to a power company.

Commission Judge James Broderick rejected Westwood's argument that its facility is outside the coverage of the Mine Act because it is a power plant burning fuel rather than an operation engaged in the production of a marketable mineral, Westwood Energy Properties, 11 FMSHRC 105 (January 1989). Judge Broderick found that "the culm bank clearly resulted from the working of extracting coal . . . and that a literal construction of the statutory language" defining a "mine" under section 3(h)(1) of the Act covered Westwood's culm bank. 11 FMSHRC 110. Judge Broderick stated in part as follows at 11 FMSHRC 115:

> I am persuaded that the sweeping definition of a coal or other mine in the Act, and the admonition in the Legislative History that the term be given the broadest possible interpretation brings Westwood's facility within its terms. Any doubt that the culm bank is or includes "lands . . . , structures, facilities, . . . or other property including impoundments, . . . on the surface or underground, used in, . . . or resulting from the work of extracting such minerals from their natural deposits . . . " must be resolved in favor of coverage.

The Commission concluded that Westwood's activities fell within the appropriate Mine Act definitions and were therefore within the Secretary of Labor's statutory authority, and it stated as follows at page 6 of its slip opinion:

> The parties agree that Westwood's culm bank is comprised of materials resulting from Westwood Colliery's extraction of anthracite coal from its underground coal mine. Accordingly, the culm bank literally falls within the statutory definition of

"mine" since "it result[s] from the work of extracting . . . minerals from their natural deposits . . . . " 30 U.S.C. 802(h)(1). See Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986) (coal refuse pile is a "mine").

In view of the foregoing findings and conclusions, and after careful consideration of all of the arguments advanced by the parties, I conclude and find that the mine site where the reclamation or demolition work in question was taking place in this case is a "mine" within the definitional language found in sections 3(h)(1) and 3(h)(2) of the Act, and that at the time of the inspections in question MSHA had enforcement jurisdiction and authority over that mine facility. Lancashire's arguments to the contrary ARE REJECTED. Section 104(a) "S&S"Citation No. 2891509, April 17, 1989, (Docket No. PENN 89-193-R Fact of Violation, 30 C.F.R. 77.1712

Lancashire is charged with an alleged violation of mandatory standard 30 C.F.R. 77.1712, for failing to notify MSHA's district office prior to reopening the mine. Section 77.1712, provides as follows:

> Prior to reopening any surface coal mine after it has been abandoned or declared inactive by the operator, the operator shall notify the Coal Mine Health and Safety District Manager for the district in which the mine is located, and an inspection of the entire mine shall be completed by an authorized representative of the Secretary before any mining operations in such mine are instituted. (Emphasis added).

Lancashire takes the position that section 77.1712, is inapplicable to its decision to hire a contractor to demolish the surface structures in question. In support of its position, Lancashire argues that the language of the standard is intended to apply to situations where a mine is "reopened" for the purpose of resuming "mining operations." Lancashire's interpretation of the language "reopened for mining operations" is that the mine is being reopened for active extraction or preparation of coal, and it cites the Dictionary definition of "reopen" as follows: "To open or take up again. To start over; resume," Lancashire asserts that the reclamation work at issue in this case had nothing whatsoever to do with the reopening of the mine for active coal extraction or coal preparation, and that the work being performed by the contractor simply entailed the removal of surface structures, and confirmed the appropriateness of MSHA's decision to permanently abandon the mine. Lancashire concludes that MSHA has failed to prove by any competent evidence that the

mine was being "reopened" or that Lancashire intended to resume active "mining operations." Under these circumstances, Lancashire further concludes that it had no duty to notify MSHA prior to the performance of the reclamation work in question, and that a violation has not been established.

During the course of the hearing in response to my bench question concerning any MSHA policy guidelines which may be applicable to the facts concerning this issue, MSHA's counsel stated that the facts in this case are unique, and while MSHA's program policy manual discusses jurisdiction, counsel stated that "it's probably correct" that the precise factual situation in question is not specifically addressed in MSHA's policy manual (Tr. 132).

In its posthearing brief, MSHA argues that through its Part 45 Independent Contractor Program Policy Manual (exhibit R-8), it has explicitly stated its policy of inspecting demolition activities by independent contractors, and that the citation issued by the inspector is consistent with this policy. MSHA asserts that its policy manual interprets the word "reopening" in section 77.1712, "quite differently" than Lancashire. MSHA asserts that Part 45.3 of the manual lists the types of activities by independent contractors which require contractors to obtain MSHA identification numbers, and that certain of these activities, i.e., demolition of mine facilities, reconstruction of mine facilities, and earthmoving activities would typically be done after active coal production or processing has ceased. Further, MSHA cites a policy manual provision which states that "mine operators have compliance responsibility for all activities at the mine, regardless of whether or not the independent contractor in question has an MSHA identification number," and it concludes that the phrase "all activities" included the demolition work performed by K & L at the Lancashire site.

MSHA's reliance on its Part 45 manual policy in support of its conclusion that the phrases "reopening" and "any mining operations" clearly include, or are intended to include, demolition work in connection with a previously abandoned mine site within the meaning of section 77.1712, is rejected. The issue with respect to the application of section 77.1712, in this case lies not in whether or not an independent contractor has an MSHA identification number, but rather, whether the standard may be reasonably interpreted to apply in a factual situation where it seems clear to me that a previously permanently abandoned mine site is not being reopened for the purpose of resuming the active mining or preparation of coal.

MSHA's Part 45 independent contractor regulations are intended to facilitate MSHA's enforcement policy of holding contractors responsible for violations committed by them or their employees. Contractors performing "services or construction" at

a mine are not required to obtain an identification number by the regulations, but if they are engaged in the kinds of activities listed in MSHA's policy manual, they are required to obtain a number. However, pursuant to MSHA's policy found at page 10, of the manual in question, independent contractors are still responsible for compliance with MSHA's mandatory health and safety standards, regardless of whether or not they have an MSHA number. In my view, the policy list in question simply refers to examples of the kinds of "services or construction" activities which require a contractor to obtain an MSHA identification number. The list is obviously intended to assist MSHA and its inspectors to track the activities of a contractor at a mine site to insure compliance with any mandatory standards. If MSHA is concerned about a contractor performing such services at a previously abandoned mine site without its knowledge, I see no reason why it cannot include its policy guidelines as part of its Part 45 regulations, or otherwise require a contractor to obtain an identification number or to inform MSHA of these activities before beginning any work.

In my view, the fact that MSHA's Part 45 policy requires a contractor performing demolition work to obtain an MSHA identification number, and the fact that such work in connection with the mine structures which are the result of past coal extraction and preparation, support a conclusion that the situs of the work fits the statutory definition of "coal or other mine" for purposes of Mine Act and MSHA jurisdiction, does not ipso facto establish that the demolition work falls within the ambit of section 77.1712.

Neither party in these proceedings has made reference to MSHA's policy statements regarding section 77.1712. MSHA's current policy regarding this section is found in Volume V, Part 77 of its Program Policy Manual, pgs. 204-205, July 1, 1988, and it states as follows:

> 77.1712 Reopening Mines; Notification; Inspection Prior to Mining
>
> Failure of the operator to notify MSHA of the reopening of the mine before operations begin is a violation of this Section. Failure to have all the plans, programs and systems submitted during this inspection is not necessarily a violation. During a reopening inspection required by Section 77.1712, the inspector should ascertain that the operator is fully informed and aware of the applicable plans, programs, and systems required by Part 77.

MSHA's prior policy manual, chapter III, pgs. III-352-353, March 9, 1978, with respect to section 77.1712, included a listing of the "plans, programs, and systems" required by Part 77,

and they include the mandatory regulatory requirements for training programs, refuse piles, impoundment structures, ground control plans, mine maps, emergency communications, emergency medical assistance and transportation arrangements, and slope and shaft sinking plans. The past and present policy statements contain absolutely no references with respect to the meaning of the terms "reopening" and "mining operations," and they do not mention demolition or construction work.

MSHA's definition of a "permanently abandoned mine," which is found in its computerized coding system for tracking the status of a mine, category GC, defines such a mine as follows: "The work of all miners has been terminated and production activity has ceased and it is not anticipated that activity will resume in the near future" (emphasis added). In the course of pre-trial discovery, MSHA produced a list of 12 mine sites in District No. 2, which had at one time been placed in a permanently abandoned status after active coal mining ceased (Exhibit R-9). The information furnished by MSHA reflects that these mines were subsequently reactivated, but there is no information as to the nature of the activities which took place after the reactivations. During the course of the hearing, and in response to my inquiries as to the nature of the activities which were taking place at the time the mines were reactivated, MSHA's counsel stated he had not provided this information because "I wasn't asked that in discovery" (Tr. 21, 29). Counsel indicated that a witness was available to supply this information and that testimony would be adduced to further explain the activities which took place at these previously abandoned and reactivated mines (Tr. 21).

Inspector Niehenke testified that a mine operator has a duty to reclaim and tear down structures that are left at an abandoned mine, but that once a mine has been declared permanently abandoned, MSHA's duty to inspect it ceases. He further stated that pursuant to MSHA's policy manual, if demolition work is being done at a mine which had been permanently abandoned, and MSHA is aware of it, the mine would be removed from its permanently abandoned status and placed in an active status. In the case of the Barnes & Tucker No. 20 Mine, where demolition work was performed by Mr. Morchesky in 1986 and 1987, Mr. Niehenke confirmed that he conducted an electrical inspection at the site, but did not inspect the demolition work because his supervisor instructed him not to and offered no explanation as to why he should not inspect the demolition work.

Mr. Niehenke also alluded to an inspection and citations which he issued at the No. 24-D Mine Portal, and confirmed that shaft sealing work was being conducted at that time and that he was instructed to go to that site to inspect it. He further confirmed that the shaft sealing work was still in progress and had not been completed at the time of his inspection, and that

the mine had not "apparently" been placed in an abandoned status at the time of his inspection.

Mr. Niehenke confirmed that once a mine has been placed in a permanently abandoned status, MSHA would not inspect the facility unless the mine operator took some action that indicated that he intended to resume coal production and processing. He further confirmed that in all of his experience as a mine inspector he was not aware of any time that MSHA has asserted enforcement jurisdiction at an abandoned mine site solely because of any demolition work taking place at such a mine. The affidavit of retired MSHA Inspector Thomas J. Simmers also reflects his understanding that inspections would not resume at mine sites which had been permanently abandoned unless there some indication that the mine operator intended to resume the production and processing of coal. Inspector Sparvieri confirmed that MSHA's Part 45 policy manual does not address demolition work performed at a previously abandoned mine (Tr. 74-75).

No further testimony, evidence, or other information was forthcoming from MSHA with respect to the activities which were taking place at the previously abandoned and reactivated mines in question, and counsel does not address the matter in his posthearing brief. Lancashire's counsel concludes that the obvious inference from this lack of testimony and evidence is that none of the listed facilities involved an attempt by MSHA to exercise enforcement jurisdiction over any activity even remotely similar to demolition work being performed at a permanently abandoned facility as part of the reclamation of that facility and merely enforces the conclusion that MSHA's position in this case is novel.

In connection with the jurisdictional question raised by Lancashire, the record includes an exchange of memorandums between MSHA's District No. 2 and MSHA's Arlington, Virginia headquarters and Associate Solicitor for Mine Safety and Health, Edward P. Clair (Tr. 31-40; exhibits R-36 through R-38). The jurisdictional inquiry was initiated by the district manager after the fatal accident and the jurisdictional question raised by Lancashire at the time of MSHA's accident investigation and inspections which followed (Tr. 33-35).

In his memorandum of May 2, 1989, (exhibit R-37), Mr. Clair states in part as follows:

> It has been asserted by Lancashire Coal and K & L that since the mine site was placed in CG status by MSHA on September 6, 1988, the Agency no longer has jurisdiction over the site. However, in our view, the cessation or abandonment of mining activity at a site does not necessarily preclude MSHA from reasserting jurisdiction in the future. Should new work begin or

> similar activity recommence at the site at a later time, MSHA would need to evaluate the activity being performed. If that work came within the definition of a "mine," MSHA's responsibility would be to inspect and regulate the site under the Mine Act. (Emphasis added).

Relying on the definitional language of "mine" found in section 3(h)(1) of the Mine Act, and MSHA's Part 45 Program Policy Manual, Mr. Clair concluded as follows:

> Applying this language to the facts outlined above, it is our view that the activities being conducted by K & L at the Lancashire Coal Company site are mining activities within the meaning of the 1977 Act. The demolition and dismantling being performed involves structures, facilities and equipment which were "used in" and, hence, are now "resulting from" the work of extracting and preparing coal at the site. Just as the wording "to be used in" reflects Congress's intent that construction of structures and facilities involved in extraction and preparation of coal is subject to MSHA jurisdiction, the language "resulting from" similarly reflects coverage of activities involving the demolition or dismantling of those same facilities and structures. This view is consistent with longstanding MSHA policy requiring independent contractors performing demolition of mine facilities to obtain an MSHA identification number.

The record also includes an additional memorandum issued by Mr. Clair on May 24, 1989, in connection with a question concerning MSHA's jurisdiction over a reclamation project identified as the "Huntsville Gob" (Tr. 201-205; copy furnished by MSHA's counsel and submitted by Lancashire's counsel by letter of November 2, 1989, Tr. 277).

Based on the facts presented in the memorandum, it would appear that the Huntsville Gob reclamation project concerned a contractor who hauled gob materials from the site to a power plant in order to reduce the amount of gob which was to be reclaimed at the site. The contractor was required to "dry screen" the gob prior to loading and hauling it from the site in order to eliminate the waste materials from the coal fines which were apparently hauled away and used by the power plant which paid a percentage of the haulage costs. This money went directly to the State's abandoned mine land fund. In concluding that MSHA did not have jurisdiction over the gob project in question, Mr. Clair's memorandum states in relevant part as follows:

> Under Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the term "mine" includes

> not only land from which minerals are currently extracted, but also land "resulting from" the work of extracting minerals. On the basis of this language, MSHA has jurisdiction over certain reclamation activities, such as surface work performed by the mine operator immediately following mining to restore mined land to its original contour. However, other activities more remote from mining, such as reclamation work occurring on previously mined abandoned lands are not subject to the Mine Act.
>
> The factors considered when determining MSHA's authority in such cases include (1) the nature of the activities, particularly in relation to activities normally associated with mining; (2) the relationship in time and the geographic proximity of the activities in question to active mining operations; (3) the nature of the land at the time of the activities; and (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which equipment or facilities are shared with active mining operations.
>
> Applying these criteria to the Huntsville Gob, it is our conclusion that MSHA does not have jurisdiction over the reclamation activities in question primarily because of the nature of the activities, and the amount of time which has elapsed since mining took place on the site. These activities involve coal handling which is incidental to the reclamation process. The Federal Mine Safety and Health Review Commission (Commission) has held that "inherent in determining whether a preparation operation is a mine is an inquiry not only into whether the operator performs one or more of the listed work activities, but also into the nature of the operation." Secretary v. Elam, 4 FMSHRC 5 (1982). In the case at hand, coal screening and coal removal from the reclamation site is incidental to the reclamation process. There is no exchange of money for the coal fines, and the screening and transportation serve primarily to remove and dispose of the product from the reclamation site. (Emphasis Added).

I have difficulty finding any meaningful factual or legal distinctions which formed the basis for Mr. Clair's advisory memorandums concerning Lancashire's demolition or reclamation work and the reclamation work of the Huntsville Gob contractor who was engaged in activities normally associated with active coal mining. The contractor screened, loaded, and transported from the site coal fines which I assume resulted from coal extraction activities which had at some time in the past taken place at the site. Mr. Clair concluded that these activities

were primarily for the purpose of removing and disposing of the product from the site. In the instant proceedings, Lancashire was simply removing some old structures from the site as an initial step to the ultimate reclamation of the site, and its activities in this regard were primarily for the purpose of removing and disposing of these "products" from the site. In my view, these activities were no less "incidental" to the reclamation process, and indeed were further removed from any "coal handling" than the work performed by the Huntsville Gob contractor.

Although I am not bound by inconsistent and contradictory MSHA memorandums, I do find the rationale and criteria advanced by Mr. Clair in making his determinations to be relevant with respect to the kinds of activities encompassed by section 77.1712. For example, the Lancashire memorandum suggests the need to evaluate any "new work" or "similar activity" which may recommence after a site has been abandoned. The Huntsville Gob memorandum enumerates certain criteria to be followed with respect to any activities at a previously abandoned mine site, and they include (1) the nature of the activities in relation to activities normally associated with mining; (2) the relationship in time of the activities to active mining operations; (3) the nature of the land at the time of the activities; and (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which the equipment or facilities are shared with active mining operations.

On the basis of the facts and evidence adduced in these proceedings, I cannot conclude that the demolition and removal of the structures in question from the abandoned mine site in question were closely associated with activities normally associated with active coal mining. It is undisputed that active coal mining had not taken place at the site for at least 6-years prior to the demolition activities in question, and the underground shafts were permanently sealed in 1986, and MSHA declared the mine permanently abandoned in 1988. Mr. Falger's unrebutted credible testimony suggests that the structures which were being demolished and removed from the site had not been used in any mining activity for at least 18-years prior to their demolition. There is no evidence that Lancashire ever intended to resume any active coal mining activities at the time the demolition work was taking place. The site was dormant, and there is no evidence that Lancashire had taken any action to resume the extraction or processing of any coal after the site was declared permanently abandoned. Further, the demolition work was being done by K & L, and there is no evidence that any Lancashire employees were performing any of this work.

The regulatory language found in section 77.1712, requires a mine operator to inform MSHA before reopening an abandoned mine

and MSHA is required to inspect the mine before any mining operations are instituted. No reference is made to any activities such as demolition work. As noted earlier, MSHA's policy statements concerning the application of section 77.1712, do not mention demolition work, and there is no MSHA regulatory standard requiring the filing of any demolition plan with MSHA prior to that kind of work. The "plans, programs, and systems" alluded to in the policy statements concerning section 77.1712, are matters normally associated with active coal extraction and production. MSHA's reliance on its Part 45 policy statements in connection with its "longstanding policy" requiring independent contractors performing demolition work to obtain mine identification numbers, does not bear any rational or reasonable relationship to the obligations and duties which may be imposed on a mine operator pursuant to section 77.1712. Further, the testimony of the MSHA's inspectors in this case indicates to me that they were either confused or ignorant of any clearly defined policies concerning the inspections of demolition work at a previously abandoned mine site, and that such inspections have not been routinely or otherwise made. MSHA's failure to produce any further information concerning the 12 previously abandoned mine sites which were subsequently reactivated, raises a strong inference that the activities which resumed at those sites were activities normally associated with active coal production rather than demolition or reclamation activities.

Although I have concluded that the abandoned mine site in question constitutes a "mine" as that term is defined in the Mine Act, and that MSHA has enforcement jurisdiction, I cannot conclude that MSHA has established a violation of section 77.1712 by a preponderance of the evidence. I conclude and find that in order to establish a violation of section 77.1712, there must be some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining of coal. On the facts and evidence adduced in this case, I cannot conclude that Lancashire reopened the previously abandoned mine for the purpose or intent of resuming any active coal extraction, production, processing, or preparation, activities which I believe are usually and normally associated with active mining operations. To the contrary, I conclude and find that the demolition activities by K & L were activities normally associated with the dismantling of a mine and removing the salvaged structures from the site in order to reclaim it, rather than activities incident to the resumption of any active coal mining. Under the circumstances, I further conclude and find that the demolition work performed by K & L was not within the scope or intent of section 77.1712.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 77.1712. Accordingly, the contested citation IS VACATED.

Section 103(k) Order No. 2888399, March 21, 1989, (Docket No. PENN 89-147-R)

Section 103(k) of the Act authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine to "issue such orders as he deems appropriate to insure the safety of any persons in the coal or other mine, ... " In this case, Mr. Sparvieri confirmed that he issued the order to insure the safety of all mine personnel around the silo and screen house structures. The order, on its face, further states that it was issued to close the area to all persons except those needed to conduct and complete the accident investigation. Orders of this kind are typically issued by MSHA to secure the scenes of accidents, to insure the continued safety of mine personnel, to preserve evidence, and to facilitate MSHA's statutory authority to investigate accidents. See: Miller Mining Company, Inc. v. FMSHRC and Secretary of Labor, 3 MSHC 1017 (9th Cir. 1983). I find nothing unusual or unreasonable in the inspector's action in issuing the order in this case, and IT IS AFFIRMED. Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, (Docket No. PENN 89-148-R

Section 3(j) of the Mine Act, 30 U.S.C. 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonable be expected to cause death or serious physical harm before such condition or practice can be abated."

In Rochester & Pittsburgh Coal Company v. Secretary of Labor, 11 FMSHRC 2159, 2163 (November 1989), the Commission adopted the position of the Fourth and Seventh Circuits in Eastern Associated Coal Corporation v. Interior Board of Mine Operation Appeals, 491 F.2d 277, 278 (4th Cir. 1974), and Old Ben Coal Corp. v. Interior Board of Mine Operation Appeals, 523 F.2d 25, 33 (7th Cir. 1975), holding that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." In the Old Ben Corp. case, the court stated as follows at 523 F.2d at 31:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb . . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (Emphasis added).

The evidence in this case establishes that at the time of the issuance of the order, Inspectors Sparvieri and Kuzar had both personally observed the condition of the silo and the screen house. Mr. Sparvieri's credible testimony establishes that a large portion of the silo base was missing, and that several of the steel reinforcing bands which had been around the structure had been cut and were hanging down. The employee who was killed had returned to the base of the silo where he had previously performed work cutting some of the bands to resume the cutting of additional bands with a torch, and as he prepared to do so the base of the structure collapsed and inundated him with the materials which came out of the silo. Having viewed the silo structure after the accident, Mr. Sparvieri concluded that it was in a weakened and unsafe condition, inadequately supported, and posed a hazard and danger to employees or others on the property who might venture near it. Indeed, the structure collapsed on its own several days later after the order was issued. Mr. Sparvieri's conclusions regarding the condition of the silo, as he viewed it, were based on his observations of the missing portion of the base of the structure, and the supporting bands which had been cut and hanging down. While it is true that the bands were deliberately cut in order to weaken the structure to facilitate its collapse and ultimate removal from the mine site, the fact remains that after the accident, the silo was in fact in a weakened and dangerous condition, subject to collapse at any time, particularly if work were allowed to continue.

With regard to the screen house structure, Mr. Sparvieri believed that it too was in a weakened and hazardous condition. Although he did not know how much work had been done on the support legs to weaken them, he nonetheless expressed his concern about the safety of the structure. His principal concern focused on the pieces of steel and tin siding materials which he observed hanging from the top and sides of the structure as shown in the photographs which he took of the structure while it was still erect. Mr. Sparvieri believed that these overhanging materials resulted from the condition of the structure, and that they were not deliberately torn of or stripped away while the structure was being dismantled. However, he conceded that he did not know that this was in fact the case, and agreed that if the steel siding were being stripped away, the partially stripped materials would remain in place if the job were interrupted (Tr. 77).

None of the employees who were working at the site at the time of the accident were called for testimony in this case. There is no testimony of record from either Mr. Falger or Mr. Morchesky with respect to the overhanging siding materials which concerned Mr. Sparvieri. Nor is there any testimony as to when these materials may have been stripped away from the structure and left in the condition noted by the inspector. Since they were in place shortly after the accident, one may reasonable conclude that they were in this condition when employees were

working at the base of the structure notching the legs and performing other work. Mr. Sparvieri believed that the materials posed a hazard to these employees working beneath them, and several employees informed him that they had notched the legs sometime during the day of the accident.

In describing the work performed by his employees on the morning of the accident, Mr. Morchesky confirmed that both the silo and the screen house were being weakened so that they could ultimately be collapsed. The notches were cut in the screen house to facilitate the installation of cables which would have been used to collapse the structure. He conceded that the work was dangerous, and that his crew worked in "two man" teams while one man worked and the other man stood by "with his hand on somebody's shoulder to pull him free and clear of anything, if something was going to happen" (Tr. 251). He conceded that the silo "was not weakened exactly as it was supposed to" (Tr. 251), and Inspector Kuzar, who was present when the screen house was finally taken down, confirmed that while it took some effort to take it down, "it didn't come the way they were planning on it coming down" (Tr. 227). Mr. Kuzar also expressed his concern about the presence of workers under the overhanging siding materials while they were engaged in the notching of the screen house legs (Tr. 227).

After careful review of all of the testimony and evidence with respect to the conditions of the silo and screen house structures at the time the contested order was issued, I conclude and find that the conditions, as described by Inspector Sparvieri, and as corroborated by Inspector Kuzar, could reasonably be expected to cause death and serious physical harm to the employees who were working under and around these structures if the normal work operations were permitted to proceed in those areas before the dangerous conditions were eliminated. Under the circumstances, I conclude and find that Inspector Sparvieri acted reasonably and that his decision to issue the order was justified. Accordingly, the contested imminent danger order IS AFFIRMED.

Section 104(a) non-"S&S" Citation No. 2891508, April 17, 1989, (Docket No. PENN 89-192-R

Fact of Violation, 30 C.F.R. 45.4(b)

Lancashire is charged with a violation of 30 C.F.R. 45.4(b), which provides as follows:

> (b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make

this information available to any authorized representative of the Secretary upon request.

Lancashire does not dispute the fact that it failed to maintain the information required by section 45.4(b), and indeed stipulated that the information was not maintained in writing at the work site. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Section 104(a) "S&S" Citation No. 2891501, March 21, 1988, (Docket No. PENN 89-149-R)

Fact of Violation, 30 C.F.R. 77.200

Lancashire is charged with a violation of 30 C.F.R. 77.200, which provides as follows: "All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees."

The inspector issued the citation after observing that several reinforcing bands had been cut from around the base of the silo, weakening the structure (Photographic Exhibits R-16, R-17, R-18). He believed that the removal of the bands affected the stability of the structure, and that part of it had collapsed, further weakening it. Under these circumstances, the inspector concluded that the silo was not maintained in good repair to prevent accidents or injuries to employees as required by the cited standard. He also believed that the standard applied to demolition work, and the fact that the structure was being torn down still required it to be maintained in a safe condition so that the employees working to dismantle it were not exposed to a risk of injury.

With regard to the screen house structure, the inspector did not believe that it was maintained in good repair because he observed loose sheet metal siding materials hanging from the sides of the structure (photographic exhibits R-15, R-20, R-21, R-25). He believed that these materials posed a hazard and risk of injury to the employees who were working on the ground in and around the structure and under the materials. Under these circumstances, the inspector concluded that the structure was not maintained in good repair as required by the standard.

The inspector determined the condition of the screen house through observation only, and he did not know to what extent the siding materials were secured to the structure (Tr. 64). He did not know for a fact that the materials had been stripped away from the structure during the demolition work, and stated that "its possible that stuff had fallen off and not been stripped off," and that due to the condition of the structure as he viewed it, it appeared that the loose overhanging materials had fallen

off (Tr. 63, 75). He did not know when the site was last inspected by MSHA, and except for the bands which had been cut away from the silo, and the notches which had been made in the support legs of the screen house, he assumed that both structures were in the same condition as he found them at the time the demolition work began (Tr. 75). The inspector believed that a structure which is being taken down could still be maintained in good repair, and he agreed that one cannot conclude by simply looking at a structure while it is being demolished that it is not in good repair pursuant to section 77.200 (Tr. 76).

Lancashire argues that the "disrepair" associated with the silo was the result of the demolition work, and that with respect to the screen house, the inspector had no evidentiary support for his belief that the materials which were hanging from the side of the structure may have been in that condition prior to the beginning of the demolition work. Since there is no evidence that any of the MSHA inspectors who had performed periodic inspections at the work site prior to 1988, had cited Lancashire for permitting loose metal to hang from its screen house, Lancashire concludes that it was maintained in good repair prior to the beginning of the demolition work in 1989.

Lancashire asserts that at the time of the accident, all demolition work stopped "mid-course" after the contractor purposely weakened the two structures in accordance with its demolition plan, and that when the inspector initially viewed the structures during his accident investigation, the structures were viewed in their partial state of demolition. Lancashire argues that it is obvious that any time demolition work is being performed and is stopped mid-course, a structure could be found not to be in "good repair." Lancashire points out that after MSHA took control of the demolition work, the screen house was demolished using the same plan devised by the contractor. Assuming that Inspector Sparvieri had stopped this MSHA-supervised demolition work at any given point after it had begun, but before it had been completed, Lancashire suggests that the inspector would have found the screen house to not be maintained in a state of "good repair." Under the circumstances, Lancashire concludes that regardless of who it is supervising or performing the demolition work, it could virtually always be cited for not maintaining a structure in "good repair" if the demolition work is stopped mid-course. Lancashire concludes that the evidence of record establishes that this is not a case where it failed to maintain the cited structures in good repair. Rather, Lancashire maintains that it simply hired a contractor who intentionally placed the structures in "bad repair" as part of its plan to demolish them, and that it makes no sense to cite Lancashire for not keeping them in good repair.

MSHA agrees that once a structure is demolished, it is clearly no longer in good repair and that it would be ludicrous

to require it to be maintained in good repair per se at all times. However, MSHA takes the position that the structures must be maintained in a condition to prevent injury to employees, and that throughout any demolition process the structures must be maintained in such a condition as to prevent injuries or hazard exposure to employees doing the work. MSHA concludes that the condition of the silo and the screen house were not maintained in a safe condition, and posed an injury risk to the employees working in those areas.

After careful consideration of all of the evidence in this case, I agree with MSHA's position with respect to the application of section 77.200, to the work which was being performed at the time of the accident. In my view, the fact that demolition work was taking place did not absolve Lancashire from its duty to insure that the structures were maintained in "good repair" to prevent accidents and injuries to those employees who were doing the work. Although the work was under the supervision of the contractor, Lancashire had a supervisory employee (Falger) at the work site after the shafts were sealed and the mine was abandoned. Part of Mr. Falger's duties involved security at the site, and he acknowledged that during his demolition negotiations with Mr. Morchesky, they visited the work area where Mr. Falger pointed out the structures to Mr. Morchesky and explained the work that was to be done (Tr. 144). At that point in time, I believe it is reasonable to conclude that Mr. Falger and Mr. Morchesky knew or should have known about the conditions of the two structures, and in particular the loose and overhanging materials at the top and side of the screen house.

Lancashire's arguments and suggestions that the silo and screen house were rendered in "disrepair" as a result of the demolition work which was interrupted mid-course by the accident and the MSHA orders which followed are rejected. While it is true that demolition work may result in the further deterioration of the structures being razed, the issue here is whether or not the conditions of the structures, as reflected in the unrebutted testimony of the inspectors, support a reasonable conclusion that they existed at the time the work was taking place, and whether they posed a hazard to the employees performing the work.

Lancashire has advanced no credible testimony or evidence to support any conclusion that the loose overhanging materials at the top and sides of the screen house were conditions which resulted from any demolition work which may have been interrupted mid-course, and posed no hazard to those performing the work. There is no testimony from Mr. Falger or Mr. Morchesky with respect to whether or not the siding materials in question were stripped away from the structure during the demolition work. Even if they were, I believe that Lancashire nonetheless had a duty to insure that these materials did not pose a hazard to the employees working in the areas below the materials.

Mr. Morchesky confirmed that on the day of the accident, his workers were working at the screen house notching the inside support beams and legs so that cables could be attached to pull the structure down (Tr. 251-252). The work orders for the screen house and silo (Joint Exhibits 1 and 2), simply reflect that K & L was to raze the structures and "dismantle and reclaim the scrap," and the documents include no details as to how this work was to be performed. Since the removal of each and every piece of sheet metal siding is costly and labor intensive, I believe that one may reasonably conclude that K & L intended to reclaim the scrap materials and haul it away after the structure was pulled down, rather than dismantling the structure piece-by-piece.

Although Inspector Sparvieri was uncertain as to whether or not the screen house conditions which he observed resulted from the demolition work taking place, he believed that the conditions were the result of the general condition of the structure and that the loose and overhanging materials should have been taken down in order to remove the potential for an accident or injury to the employees working below them. Given the fact that the structure had not been in use for many years, I believe that one may reasonably conclude that as a surface structure, it would be subjected to deterioration and corrosion through exposure to the elements over a long period of time, and that it is just as likely as not that the structure was simply left unattended over a period of time prior to the onset of the demolition work.

With regard to the silo structure, the accident report reflects that the employee who suffered fatal injuries had completed his work of cutting some of the steel support bands around the base of the silo approximately 15 minutes prior to the accident, and that he had returned to the base area with a cutting torch in his hand, and was observed in a kneeling position by another employee when the base gave way freeing the coal materials inside the silo and inundating him. Mr. Morchesky confirmed that while it was known that the silo was constructed of cement block, the work being performed by the victim was accomplished in order to weaken the structure so that once it started to topple, the weight of the topped screen house falling on it would crush the rest of the silo (Tr. 276). When asked whether anyone made any determination as to what was in the silo before this work began, and why any work to weaken it would be performed before anyone knew what was in it, Mr. Morchesky explained that one could observe the coal in the silo, at least up to the window level, but he could offer no explanation as to why so many of the bands had been cut, or why the accident victim returned with the base of the silo with his cutting torch. It seems reasonably obvious to me that no hazard assessment was made by Lancashire or K & L with respect to the stability of the structure in its weakened state after the initial cutting away of the support

bands, which one may also reasonably conclude caused it to give way.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has established by a preponderance of the evidence that the silo and screen house structures were not maintained in good repair to prevent accidents or injuries to the employees performing work as required by section 77.200, and the citation 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).

I conclude and find that the condition of the silo and screen house structures, as observed and described by the inspector, including the failure by Lancashire to insure that these structures were maintained in good repair, exposed the workers who had performed work in those areas both before and at the time of the accident to hazardous conditions. The worker exposed to the weakened condition of the silo suffered fatal injuries. The workers doing the work in and around the ground areas of the screen house were exposed to a falling materials hazard, and in the event they were struck by any of these materials, I believe that it was reasonably likely that they would sustain injuries of a reasonably serious nature. Accordingly, the inspector's significant and substantial (S&S) finding IS AFFIRMED.

Estoppel and Selective Enforcement Issues

As part of its pre-trial pleadings, and during the course of oral argument during the hearing in connection with its jurisdictional arguments, Lancashire contended that since MSHA failed to inspect similar prior demolition work performed by the same contractor at another mine site (Barnes & Tucker No. 20 Mine), MSHA was estopped from inspecting Lancashire's mine site, and that its attempts to do so in these proceedings constitutes arbitrary and capricious selective enforcement. Lancashire's posthearing brief does not address these issues.

Citing the applicable case law with respect to the doctrine of estoppel, MSHA argues that Lancashire has not met its burden of establishing any misrepresentations or misconduct on the part of MSHA with respect to its actions or inactions at the Barnes and Tucker mine site, and has not established that it has been prejudiced, or has suffered any detriment, by virtue of MSHA's refraining from inspecting its mine site until March 21, 1989. MSHA cites the testimony of the contractor (Morchesky) that his employees welcomed the presence of MSHA's inspectors at the site after the accident because "the more people around with opinions, everybody just felt better" (Tr. 253). MSHA concludes that the inspectors sought to regulate the mine site to protect the affected employees and others who may have been there.

With regard to the selective enforcement issue, MSHA cites the applicable case law, and concludes that Lancashire cannot meet its burden of proof establishing that it "was singled out for prosecution among others similarly situated and that the decision to prosecute was improperly motivated." MSHA points out that it has produced evidence that other mines in MSHA's Johnstown Subdistrict office which were placed in an abandoned status and then subsequently reactivated were inspected. During the course of the hearing, MSHA's counsel pointed out that immediately following the accident, the inspectors sought further advice with respect to the jurisdictional question raised by Lancashire, and subsequently returned to continue with their inspections after they were informed they were authorized to do so (Tr. 33). MSHA concludes that there is not a shred of evidence to suggest that MSHA was "improperly motivated" in seeking to regulate Lancashire's mine site, and that it did so to protect the safety of the employees who were working there.

In Secretary of Labor v. Superior Sand and Gravel, Inc., and Patrick K. Thornton, 2 FMSHRC 1308 (June 1980), Judge Broderick rejected a mine operator's defense that it was singled out for enforcement by MSHA because other operators were not being inspected and fined, and he cited Thompson v. Spear, 91 F.2d 430, 433-34 (5th Cir. 1937), cert. denied, 302 U.S. 762 (1938), where the court held as follows:

> [The agency's] mere inability does not render such enforcement as it accomplished wrongful. The fact that others violated the law with impunity is no defense. It is only when the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily or unjustly that enforcement of a valid regulation [violates the law].

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1980), the Commission rejected the doctrine of equitable estoppel with respect to a mine operator's liability for a violation. However, the Commission viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which may be considered in mitigation of the civil penalty. Further, Commission Judges have consistently rejected an operator's reliance on prior inspections and the lack of citations, and have held that the lack of prior inspections and the lack of prior citations does not estop an inspector from issuing citations during subsequent inspections. See: Midwest Minerals Coal Company, Inc., 3 FMSHRC 1417 (January 1981); Missouri Gravel Co., 3 FMSHRC 1465 (June 1981); Servtex Materials Company, 5 FMSHRC 1359 (July 1983). In Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, the Court of Appeals for the Tenth Circuit, in affirming the

Commission's decision at 5 FMSHRC 1400 (August 1983), stated as follows at 3 MSHC 1588:

> As this court has observed, "courts invoke the doctrine of estoppel against the government with great reluctance" . . . . Application of the doctrine is justified only where "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation" . . . . Equitable estoppel "may not be used to contradict a clear Congressional mandate," . . . as undoubtedly would be the case were we to apply it here . . . .
>
> Although the record reflects some confusion surrounding MSHA's approval of Emery's training plan, as a general rule "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law" . . . .

After careful review of the record in these proceedings, and the arguments advanced by the parties, I agree with the position taken by MSHA, and I conclude and find that Lancashire has not established by a preponderance of any credible evidence that MSHA has acted arbitrarily or capriciously by exercising its enforcement and inspection authority at the mine site in question. I also reject Lancashire's selective enforcement argument, and I cannot conclude that MSHA was improperly motivated in initiating the enforcement actions in question against Lancashire. In my view, any inconsistencies or contradictions with respect to MSHA's enforcement policies and practices concerning demolition work at previously abandoned mine sites does not rise to the level of prejudicial arbitrary action against Lancashire.

History of Prior Violations

The parties have stipulated that for the 2-year period preceding the issuance of the contested violations, Lancashire had no assessed violations. I adopt this stipulation as my finding, and have taken this into consideration with respect to the civil penalties which I have assessed for the violations which have been affirmed.

Good Faith Compliance

The parties have stipulated that Lancashire demonstrated good faith in attempting to abate the alleged violations, and I adopt this as my finding and have taken it into consideration.

Gravity

In view of my "S&S" findings with respect to section 104(a) Citation No. 2891501, concerning a violation of 30 C.F.R. 77.200, I conclude and find that it was a serious violation. With regard to Citation No. 2891508, concerning Lancashire's failure to maintain the information required by section 45.4(b), I conclude and find that the violation was non-serious.

Negligence

I agree with the inspector's moderate negligence findings with respect to the two citations which have been affirmed, and I conclude and find that the violations resulted from Lancashire's failure to exercise reasonable care.

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

The record reflects that at the time the citations were issued, Lancashire had one employee at the mine. The parties stipulated that payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding on this issue, and have considered these matters in the civil penalty assessments which have been assessed by me for the violations which have been affirmed.

Civil Penalty Assessments

With respect to Citation No. 2891501, for the violation of section 77.200, Lancashire takes issue with the basis for the "special assessment" of $3,000, as articulated by the "Narrative Findings" of MSHA's Office of Assessments. Specifically, Lancashire takes issue with the statement that "the cause of the accident was management's failure to provide an adequate plan for the safe demolition of the coal site." Lancashire asserts that it had no reason to believe that K & L's demolition plan was inadequate, and that it is inappropriate and highly unfair to charge it with not maintaining the structures in good repair while they were in the process of being demolished.

Inspector Sparvieri conceded that there are no MSHA mandatory regulations requiring a contractor or mine operator to file a demolition plan with MSHA prior to commencing the work (Tr. 109). Although the imminent danger order required K & L to submit a written demolition plan before continuing with its work, no written plan was submitted. However, Inspector Kuzar obviously accepted the verbal description of the demolition procedures as communicated to him by K & L while he was present when this work was taking place as adequate to insure the safety of the personnel doing the work. If this were not the case, I

would assume that Mr. Kuzar would not have allowed the work to continue in the absence of a written plan. Although the silo had already fallen down when Mr. Kuzar returned to the site, he confirmed that the procedures used by K & L to take down the screen house after the orders were issued and modified were essentially the same procedures followed by K & L prior to the accident. Under the circumstances, one may reasonably concluded from this that the lack of a demolition plan per se may not necessarily establish that the procedures followed by K & L were inadequate, or that the lack of a plan caused the accident.

It is clear that I am not bound by MSHA's "special assessment" for the violation in question, and that I may consider any appropriate mitigating circumstances, particularly with respect to Lancashire's negligence, in the assessment of a civil penalty for the violation in question. See: Allied Products Company v. FMSHRC, 666 F.2d 890, 896 (5th Cir. 1982); Nacco Mining Co., 3 FMSHRC 848, 850 (April 1981); Marshfield Sand & Gravel, Inc., 2 FMSHRC 1391 (June 1980); Old Dominion Power Co., 6 FMSHRC 1886 (August 1981); Secretary of Labor v. Marion County Limestone Company, LTD., 10 FMSHRC 1683 (December 1982).

Although I have considered Lancashire's argument with respect to the asserted lack of a safe written demolition plan, and have considered the fact that it may have reasonably believed that it was not required to maintain the structures in good repair after MSHA permanently abandoned the mine and advised it that it would no longer inspect the facility, the fact is that the silo which collapsed and resulted in the death of the employee in question was not maintained in a safe condition as the work progressed and it was in a weakened condition at the time that the employee was working on it. In my view, closer supervision of the employee, inspection of the work which he had already performed, and at least some hazard assessment by K & L and Lancashire before the work began may have prevented the accident. Under these circumstances, although I have taken into consideration Lancashire's arguments in mitigation of the special assessment proposed by MSHA for the violation, and have affirmed the inspector's moderate negligence finding, I find no reasonable basis for any substantial decrease or increase in the civil penalty assessment proposed by MSHA.

In view of the foregoing findings and conclusions made by me in these proceedings, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the civil penalty assessments which I have made for the two violations which have been affirmed in these proceedings are reasonable and appropriate in the circumstances.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

1. Docket No. PENN 89-147-R. Section 103(k) Order No. 2888399, IS AFFIRMED, and Lancashire's contest IS DENIED.

2. Docket No. PENN 89-148-R. Section 107(a) Imminent Danger Order No. 2888400, March 21, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

3. Docket No. PENN 89-149-R. Section 104(a) "S&S" Citation No. 2891501, March 21, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

4. Docket No. PENN 89-192-R. Section 104(a) non-"S&S" Citation No. 2891508, april 17, 1989, IS AFFIRMED, and Lancashire's contest IS DENIED.

5. Docket No. PENN 89-193-R. Section 104(a) "S&S" Citation No. 2891509, April 17, 1989, IS VACATED, and Lancashire's contest IS GRANTED.

6. Civil Penalty Docket No. PENN 90-10. Lancashire is assessed a civil penalty assessment in the amount of $2,800, for a violation of 30 C.F.R. 77.200, as noted in the section 104(a) "S&S" Citation No. 2891501, issued on March 21, 1989. Lancashire is also assessed a civil penalty assessment in the amount of $20, for a violation of 30 C.F.R. 45.4(b), as noted in the section 104(a) non-"S&S" Citation No. 2891508, issued on April 17, 1989.

Payment of the civil penalty assessments shall be made by Lancashire to MSHA within thirty (30) days of the date of these decisions and Order, and upon receipt by MSHA, the civil penalty proceeding is dismissed.

George A. Koutras
Administrative Law Judge

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