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SOL (MSHA) V. UNITED ENERGY SERVICES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-916
Petitioner	:	A.C. No. 46-01309-03501 KYC
v.	:	
	:	Docket No. WEVA 92-961
UNITED ENERGY SERVICES, INC.,	:	A.C. No. 46-01309-03503 KYC
Respondent	:	
	:	Docket No. WEVA 92-1045
	:	A.C. No. 46-01309-03503 KYC
	:	
	:	Docket No. WEVA 93-97
	:	A.C. No. 46-01309-03504 KYC
	:	
	:	North Branch Mine

SUMMARY DECISIONS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for seven (7), alleged violations of certain mandatory safety and training standards found in Parts 48 and 77, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers, contending that it is an electrical utility subject to regulation by the Occupational Safety and Health Administration (OSHA), and that MSHA has no inspection or enforcement jurisdiction over its operations. The petitioner takes the position that the respondent is an independent contractor performing services at a mine. It also takes the position that the respondent's operations, except for the cogeneration plant building itself, is "a coal or other mine" pursuant to the Mine Act because its operations includes the "work of preparing the coal" pursuant to the Act.

Issues

The principal issues presented in these proceedings are (1) whether the respondent is an independent contractor mine "operator" subject to the Act; and (2) whether the respondent's

cogeneration plant operations (except for the plant building itself), is "a coal or other mine" subject to the Act. Assuming that jurisdiction attaches, the additional issues presented include the alleged fact of violations, the special findings made by the inspectors who issued the violations, and the appropriate civil penalty assessments to be assessed for the violations taking into account the penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

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

2. Sections 110(a) and (i) of the 1977 Act, 30 U.S.C. 820(a) and (d).

3. MSHA's Independent Contractor regulations, Part 45, Title 30, Code of Federal Regulations.

Background

The North Branch Cogeneration Plant, also referred to as the "North Branch Power Plant" or "North Branch Power Project", is located on an approximately 370 acre site near the City of Bayard in Grant County, West Virginia. The plant converts coal wastes contained in a gob pile as fuel to generate electric power. The plant was built by North Branch Partners, Limited (NB Partners Ltd.), a partnership comprised of three individuals. NB Partners Ltd., manages the plant. Approximately ninety eight percent (98%) of the plant rests on the property secured by the Bank of America, and approximately two percent (2%) of the plant, including a belt system and related equipment, is located on land owned by the Island Creek Coal Company. There is no fence separating the two properties. In addition to the portion of the conveyor belt system located on Island Creek's property, that property also contains the North Branch Mine, the North Branch Preparation Plant, and the North Branch refuse area and gob pile, all of which are operated by the Laurel Run Mining Company. The respondent asserts that the North Branch Mine and Preparation Plant are no longer in operation.

The respondent has been described by the parties as a corporation principally owned by Gilbert and Associates, a publicly traded corporation. Pursuant to a continuing services agreement with NB Partners Ltd., the respondent provides labor to operate and maintain the power plant, the conveyor system to and from the plant, and the related facilities. The respondent employs sixty-five (65) people at the plant, including plant manager Robert E. Seavy, whose deposition reflects that the

respondent has approximately 150 other similar service contracts throughout the world. Mr. Seavy stated that the respondent provides "all of the labor to operate and maintain the facility. We purchase all of the material, parts, consumables, as a service to them. They pay the bills. We just do the purchasing. We provide consulting in engineering" (Tr. 12).

Mr. Seavy stated that the respondent's presence at the site began in the fall of 1988, when it signed a services agreement contract with the plant managing company, NB Partners Ltd., but that no personnel were placed at the site until the fall of 1989. The plant and conveyor belt system were not completed at the time the service contract was signed, and substantial completion of the plant was accomplished in the late spring of 1991, when the conveyor belt system began carrying coal refuse from the gob pile to the plant (Tr. 15). The respondent's material handling supervisor, Jim Bowman, testified by deposition that his task is "to operate and maintain the movement of gob to the power plant", and that he supervises sixteen (16) material handlers to do this (Tr. 8, 11).

Mr. Seavy stated that the Wylie Construction Company had a contract with Energy America to design and install the overlaying conveyor belt system used to transport the gob to the power plant and to remove the ash after the gob is burned. He described Energy America as "the developers of the plant", and indicated that Energy America had a contract with Security National Bank (Tr. 15-16). He confirmed that with some modification, the respondent is maintaining and servicing the belt conveyor system designed and installed by the Wylie Construction Company. Although the respondent's service contract and the contract awarded Wylie Construction overlapped, Mr. Seavy confirmed that the respondent never had any contractual relationship with Wylie Construction (Tr. 16).

In its response and opposition to the petitioner's summary judgment motion, the respondent agreed to the following:

1. The Commission and the presiding Administrative Law Judge have jurisdiction to hear and decide these docketed proceedings based on MSHA's issuance of the subject citations and orders and the respondent's objections thereto based primarily on its assertion that MSHA has no jurisdiction over its operations.

2. True copies of the citation and orders were served on the respondent.

3. The citation and orders attached to the petitioner's proposals for assessment of

civil penalties in these proceedings are authentic copies of the citation and orders in issue, with all appropriate modifications or abatements.

4. At all times relevant to these proceedings, the respondent has been providing labor to operate and maintain the power plant conveyor system pursuant to a continuing service agreement with North Branch Partners Ltd.

In addition to the aforementioned "Background" information, the following facts are not in dispute:

1. Under the terms of the continuing services agreement with North Branch Partners, Limited, the respondent has, at all times relevant herein, been providing the labor to operate and maintain the plant, the conveyor system to and from the plant, and their related facilities.

2. The North Branch refuse area contains the remainder of the material mined over the years from the North Branch Mine after the marketable coal was extracted, with this remainder, or gob, having been transported to the North Branch refuse area from the North Branch Mine and the plant. The gob pile extends at least one (1) mile in length.

3. The plant uses the circulating fluidized bed process as the combustion method powering its electric generating facility.

4. The plant uses the gob from the North Branch refuse area by burning it in boilers to generate electricity.

5. In order for the electric generating facility at the plant to use the gob from the North Branch refuse Area as fuel the gob must contain no piece that measures larger than one-quarter (1/4) inch in any direction.

6. The gob from the North Branch refuse area is supplied to NB Partners under a contract with Laurel Run Mining Company, an affiliate of Island Creek, whereby gob containing at least 3,500 BTU per pound with less than ten (10) percent moisture content, is supplied, with Laurel Run providing disposal of the ash.

7. The gob received from the North Branch refuse area must contain at least seven (7) to ten (10) percent carbon to burn in the plant.

8. At all times relevant to these proceedings, the portion of the conveyor system resting on the property owned by Island Creek extends approximately three hundred (300) to five hundred (500) feet onto the Island Creek property and terminates at the North Branch Mine refuse area.

9. The respondent is authorized to operate the conveyor system on the property owned by Island Creek under the continuing services agreement with North Branch Partners.

10. There are no fences separating the conveyor system from the remainder of the property owned by Island Creek.

11. The conveyor system uses two (2) conveyor belt systems, with the first used to transport the gob to the power plant, and with the second used to transport the ash created from the burning of the gob back to the North Branch refuse area.

12. Bulldozers push the gob into a dozer trap (also referred to as the dozer feeder).

13. The bulldozers that push the gob into the dozer trap are owned by either Island Creek or Laurel Run, and the bulldozer operators are employees of Laurel Run.

14. At all times relevant to these proceedings, the dozer trap has been resting approximately three hundred (300) to five hundred (500) feet from the plant property line and is on the North Branch refuse area property.

15. As the gob is depleted, the dozer trap will be moved closer to the property line in increments, and it is expected to reach the property line in approximately ten (10) years.

16. The gob is pushed by the dozers through a hole in the end plate of the dozer trap.

17. The end plate of the dozer trap measures approximately ten (10) feet high and twelve (12) feet wide, with the hole in the end plate measuring approximately three (3) feet by three (3) feet.

18. Although the hole in the end plate of the dozer trap measures approximately three (3) feet by three (3) feet, it has, at all times relevant to these proceedings, been partially obstructed by an isolation gate, a sheet of metal that drops down over the hole so that the size of the opening can be changed.

19. At all times relevant to these proceedings, the size of the opening in the end plate of the dozer trap has been no more than two (2) feet high due to the presence of the isolation gate.

20. Items that cannot fit through the opening in the end plate of the dozer trap are pulled to the side by employees of either Island Creek or Laurel Run.

21. All gob that reaches the plant must pass through this opening in the end plate of the plate of the dozer trap.

22. The gob pushed through the opening in the end plate of the dozer trap comes to rest on an oscillating plate that measures approximately three (3) feet by three (3) feet, and which moves forward and backward through the opening.

23. The movement of the oscillating plate forces the gob to fall onto a conveyor belt.

24. As the gob is being transported up the conveyor belt described in Paragraph 23, an electrically powered magnet picks up any metal pieces that may be in the gob, such as mining bits, pieces of steel, and old wrenches.

25. The gob is deposited by the conveyor belt described in Paragraph 23 onto a grizzly feeder.

26. The grizzly feeder contains eight (8) inch bars which, when the gob falls onto the grizzly feeder,

permits only those gob pieces smaller than eight (8) inches to pass through, with those pieces larger than eight (8) inches falling out over the end, where they are put back onto the gob pile by employees of either Island Creek or Laurel Run.

27. The smaller pieces of gob that pass through the bars of the grizzly feeder fall onto a conveyor belt called Gob Moveable One, (also called Gob Mobile one (1) conveyor belt), a fifty (50) foot transportable conveyor belt, which caries the gob to the main conveyor belt, also called the No. 2 Gob Conveyor Belt.

28. The dozer trap, the conveyor belt in the dozer trap, the magnet, the grizzly, and Gob Moveable One are all owned by NB Partners, with any repairs to these items being performed by the respondent.

29. At all times relevant to these proceedings, the dozer trap, the conveyor belt in the dozer trap, the magnet, the grizzly, and Gob Moveable One have been located on Island Creek property, in the North Branch refuse area.

30. The main conveyor belt transports the gob across the property line shared with the Island Creek property on to the plant property.

31. Title to the gob passes to NB Partners when the gob is dumped into the dozer trap located in the North Branch refuse area, but payment is made by the ton based on the weight at a scale on the main conveyor belt located on the plant property.

32. The main conveyor belt carries the gob and deposits it into a cone-type hopper called a truck dump.

33. The truck dump is approximately forty (40) feet square and forty (40) feet deep, and can hold approximately five hundred (500) tons of gob, which represents approximately seven (7) hours of fuel.

34. The gob feeds out of the truck dump through a vibratory feeder onto another conveyor belt

called Conveyor A, which carries the gob into the Screening Building, located on the plant property.

35. As the gob is being transported by Conveyor A inside the screening building, another electrically powered magnet picks up any remaining metal pieces that may be in the gob, such as mining bits, pieces of steel, and old wrenches.

36. Inside the Screening Building, Conveyor A deposits the gob onto a Tabor Screen, which separates the gob larger than three (3) inches square from the finer gob.

37. The gob smaller than three (3) inches square falls through the Tabor Screen onto Conveyor C.

38. The gob larger than three (3) inches square is further separated, with the gob larger than six (6) inches square being directed into a reject hopper.

39. The gob larger than three (3) inches square but smaller than six (6) inches square rides along the top of the Tabor Screen and is directed into an impactor, which crushes the gob into particles no larger than three (3) inches square.

40. After being crushed by the impactor, the gob referred to in Paragraph 38 is directed back onto Conveyor C, where it is reunited with the gob smaller than three (3) inches square. At this point, all of the gob being transported is no larger than three (3) inches square.

41. Conveyor C carries the gob from the Tabor Screen in the Screening building to the Crusher Building, where it goes into another hopper, which holds a couple of hours worth of fuel.

42. The hopper in the Crusher Building drops the gob into a Pennsylvania Crusher, which reduces the material down in size to one-quarter (1/4) inch.

43. Upon exiting the Pennsylvania Crusher, the gob drops directly onto G Conveyor, where it is transported out of the Crusher Building and carried into the plant building.

44. The ash created by the boiler in the plant building is transported out of the building by screwcoolers and by a NUVA feeder system, which releases the ash into blowers, which in turn blow the ash into the Ash Storage Silo.

45. The ash in the Ash Storage Silo, which has a capacity of eight thousand (8,000) tons, falls

    through the bottom of the silo into a pug mill, which mixes the ash with water and transports the mixture to the No. 1 Ash Conveyor.

46. No. 1 Ash Conveyor carries the mixture approximately two hundred fifty (250) feet to the No. 2 Ash Conveyor, which then transports the mixture approximately five hundred (500) feet to the No. 3 Ash Conveyor.

47. The No. 3 Ash conveyor transports the mixture to approximately the property line shared with the Island Creek property, where it transfers the mixture to Ash Conveyor No. 4.

48. Ash Conveyor No. 4 transports the mixture across the property line shared with the Island Creek property onto the North Branch refuse area, where it transfers the mixture onto an elevated conveyor called Ash Conveyor No. 5.

49. Ash Conveyor No. 5 deposits the mixture into an ash hopper, which is used to load the mixture onto trucks to be spread onto the area near the hopper.

50. Although NB Partners owns the five ash conveyors and the respondent operates and maintains them, neither the ash hopper nor the trucks that carry the ash are owned or operated by either NB Partners or the respondent.

MSHA's Enforcement Activity

MSHA's initial enforcement interest at the plant site began during the spring of 1991, after MSHA's Oakland, Maryland field office learned through conversations with Island Creek's personnel, that a power plant was being constructed at the site, and that the plant planned to burn the refuse (gob) that was to be trucked to the plant site from the North Branch mine. The planned trucking of the gob was apparently abandoned, and a conveyor belt system was constructed to facilitate the transportation of the gob from the North Branch refuse area on Island Creek's property to the plant. The refuse area contains the remainder of the material mined over the years from the North Branch mine after the marketable coal was extracted. That material, or "gob", was transported to the gob pile located at the refuse area from the North Branch mine and preparation plant, and the pile extends for a distance of approximately one mile in length.

On July 30, 1991, MSHA Inspector Phillip M. Wilt went to the North Branch refuse area and observed the loading operations taking place at that location, including the conveyor system carrying gob to the power plant. Mr. Wilt issued citations to Island Creek Coal Company for violations he observed at the refuse area on Island Creek's property. Mr. Wilt returned the next day, July 31, to terminate the citations, and he made additional observations of the area. He next returned to the area on August 5, 1991, with his supervisor, Barry Ryan, and after meeting with another MSHA inspector, Edwin Fetty, at the site, they inspected the refuse area, including the first conveyor belt which was 80 to 100 feet in length. Mr. Wilt and Mr. Fetty both issued citations to Wiley Construction Company, a contractor, for violations found on the North Branch mine property.

MSHA's next inspection and enforcement activity took place between February 26, 1992, and August 27, 1992, resulting in the issuance of the following citations which are the subject of the instant civil penalty proceedings.

Docket No. WEVA 92-916

This case concerns one section 104(d)(1) citation and three section 104(d)(1) orders issued on February 26, 1992, by MSHA Inspector Joseph W. Darios. The citations as initially issued by Mr. Darios reflect that they were served on Jim Gilkey, at the North Branch Mine, and the mine operator is identified as the Island Creek Coal Company. Mr. Darios subsequently modified the citations by mail on March 3, 1992, to show that they were served on Bob Seavy rather than Jim Gilkey, and the identification of the mine operator was changed to reflect United Energy Services, Inc., rather than Island Creek Coal Company. The mine

identification number was modified to add the letter "KYC" to ID Number 46-01309. The citations issued by Mr. Darios are as follows:

Section 104(d)(1) "S&S" Citation No. 3120276 cites an alleged violation of 30 C.F.R. 77.400(d), and the cited condition or practice is described as follows:

> Three employees were observed shoveling the No. 2 Gob Conveyor Belt tailpiece at the North Branch Refuge (sic) Project with the guarding removed from the tailpiece along the roadside.
>
> Jim Bowman, supervisor, is the person responsible. This citation will be modified to show the operator name to be United Services Corporation upon issuance of a contractor identification number.

Section 104(d)(1) "S&S" Order No. 3120277, cites an alleged violation of 30 C.F.R. 77.400(a), and the cited condition or practice is described as follows:

> The rear tailpiece guard of the grizzly belt tail pulley was removed and a side guard for the grizzly belt tail pulley was not provided. The rear tail pulley guard was simply laying on the ground behind the belt assembly exposing the roller or pulley at one side and the rear which could cause injury to persons.

Section 104(d)(1) "S&S" Order No. 3120278, cites an alleged violation of 30 C.F.R. 77.400(d), and the cited condition or practice is described as follows:

> The grizzly gob feeder chain drive sprockets and drive chain located at the rear side of the grizzly belt assembly near the tailpiece was not guarded because the cover guard was simply laying on the ground beside the belt assembly and the exposure may cause injury to persons.

Section 104(d)(1) "S&S" Order No 3120279, February 26, 1992, cites an alleged violation of 30 C.F.R. 77.400(c), and the cited condition or practice is described as follows:

> The Gob Mobile 1 gob conveyor belt take-up pulley guarding did not extend a distance sufficient enough to prevent contact by and/or injury to persons because the rear side of the tail pulley was exposed approximately 6 inches past the guarding provided and which could permit contact at the pinch point of the roller and belt.

Docket No. WEVA 92-961

Section 104(g)(1) "S&S" Order No. 3120293, was issued on February 27, 1992, by MSHA Inspector Phillip M. Wilt, and he cited an alleged violation of mandatory training standard 30 C.F.R. 48.25(a). The citation, as initially issued, reflects that it was served on Bruce Hamrick, at the North Branch Mine, and the mine operator is identified as the Island Creek Coal Company. The citation was subsequently modified by MSHA Inspector Frank B. Johnson on March 13, 1992, to show the mine operator as United Energy Services Inc., and to add the letters "KYC" to the previous ID No. 46-01309. The cited condition or practice is described as follows:

> Three employees employed by the United Energy Services Corporation, Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher, were observed working near moving conveyor belt on the Island Creek Coal Company mine property during an MSHA inspection on 2-26-92 without first receiving the required training of no less than 24 hrs. of comprehensive training.
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> The three employees are considered a hazard to themselves and others, and are removed from the mine area as required under section 115 of the 1977 Coal Mine Health and Safety Act. Jim Gilkey, manager of construction at this North Branch fuel supply as the responsible person.

Docket No. WEVA 92-1045

Section 104(d)(2) "S&S" Order No. 3720850, was issued on May 12, 1992, by MSHA Inspector Kerry L. George, and he cited an alleged violation of mandatory safety standard 30 C.F.R. 77.502. The order was served on Jim Bowman at the North Branch Mine, and the mine operator is identified as the United Energy Services Corporation, with Mine ID No. 46-01309-KYC. The cited condition or practice is described as follows:

> A monthly electrical examination was not being conducted on any electrical components of the beltlines at the Co-Gen (sic) refuse site. The beltlines were on mine property and were the responsibility of the contractor. The area was under the supervision of Jim Bowman, Foreman.

Docket No. WEVA 93-97

Section 104(g)(1) "S&S" Order No. 3115366, was issued on August 27, 1992, by MSHA Inspector Kerry L. George, and he cited an alleged violation of mandatory training standard 30 C.F.R. 48.25(a). The order was served on Jim Bowman at the Nort

Branch Mine, and the mine operator is identified as the United Energy Services Corporation, with Mine ID No. 46-01309-KYC. The cited condition or practice is described as follows:

> Stanley Dragovich, material handler, was determined to be a new surface miner who had not been given training. The miner had been employed by the contractor since April 1991. Dragovich was maintaining beltlines at the Co-Gen (sic) construction site of North Branch Mine. The area was under the supervision of Jim Bowman, Foreman.

Decisions Involving Power Plants

Old Dominion Power Company v. Donovan, 772 F.2 92 (4th Cir. 1985), concerned an electric substation erected on land owned by Penn-Virginia Resources, and leased to Westmoreland Coal Company. Westmoreland built and owned the substation, and contracted with Elro Coal Company to operate the mine on the property. Westmoreland purchased high-voltage power from Old Dominion, an electrical utility, and transmitted it to the substation for conversion to voltage suitable for use by Elro in its mining operation. The only facilities owned by Old Dominion at the substation was a metering device and other equipment used to determine how much power was purchased by Westmoreland for use through the substation. In the course of checking the meter which had reportedly malfunctioned, an employee of Old Dominion was electrocuted when he touched an energized transformer which he believed had been de-energized.

MSHA and OSHA conducted an investigation and Old Dominion was not cited by OSHA. However, MSHA concluded that Old Dominion's employees violated 30 C.F.R. 77.704, a mandatory standard promulgated pursuant to the Mine Act, by working on high-voltage lines without de-energizing and grounding them. Confusion then arose as to who should be the recipient of the citation because Elro was using the power received at the substation, Westmoreland owned and operated the substation, and Old Dominion's employees performed the work that resulted in the fatality. MSHA initially served the citation on Elro, and then reissued it to Westmoreland. Approximately one year after the accident, the citation was modified to cite Old Dominion as the responsible mine operator instead of Westmoreland. Old Dominion contested the citation claiming it was neither an "independent contractor" or an "operator" under the Mine Act.

Former Commission Judge Richard Steffey initially adjudicated Old Dominion's claim, and he concluded that Old Dominion was an independent contractor subject to the Mine Act. Old Dominion Power Company, 3 FMSHRC 2721 (November 1981). In support of his decision, Judge Steffey cited the legislative history reflecting Congressional intent for broad coverage of the

Act, and he relied on the fact that Old Dominion had contracted to construct an electrical facility on mine property, and that the facility was essential to coal extraction taking place at the mine because the mining equipment would only operate when it was connected to electrical power.

Old Dominion appealed Judge Steffey's decision, and the Commission affirmed the decision. Old Dominion Power Company, 6 FMSHRC 1886 (August 1984). The Commission rejected Old Dominion's attempts to separate "mine" from "non-mine" work areas, and held that it was properly cited as an independent contractor performing services or construction on mine property. The Commission noted Old Dominion's longstanding relationship with Westmoreland, including the fact that its employees were at the mine at the request of Westmoreland. The Commission concluded that citing the party responsible for violations

committed by its employees effectuated the purposes of the Mine Act. (Then Commission Chairman Collyer dissented, and she concluded that Old Dominion was only a vendor with limited presence at the mine).

On appeal of the Commission's decision to the Fourth Circuit, the Court reversed the commission and held that Old Dominion had no continuing presence at the mine and that its only relationship with the mine was the sale of electricity. The Court took note of the inconsistent regulations adopted by MSHA and OSHA with respect to electric utilities, and it stated as follows at 772 F.2d 99:

> Requiring electric utility employees suddenly to adhere to conflicting standards depending on their job locations can only lead to danger, especially where work around high voltage is involved. . . In addition, other MSHA standards, when applied to electric utilities, lead to irrational results.
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> OSHA had adopted strict and comprehensive safety standards which include standards specifically designed to apply to electric utilities. MSHA has adopted contradictory regulations. The Secretary of Labor has not articulated any reasons why the standards applicable to electric utilities under OSHA should be different from standards which he says are applicable to electric utilities under MSHA. We conclude that MSHA regulations do not apply, and were not intended to apply, to electric utilities such as Old Dominion whose sole relationship to the mine is the sale of electricity.

Pennsylvania Electric Company v. FMSHRC, 969 F.2 1501 (3rd Cir. 1992), concerned an electric generating station located in Homer City, Indiana County, Pennsylvania, owned by Penelec and the New York State Electric and Gas Corporation. The station burned approximately 4.5 million tons of coal a year producing electricity generated by coal combustion. The coal purchased by Penelec entered the station from a conveyor running from an adjacent mine operated by Helen Mining Company; from another conveyor running from an adjacent mine operated by the Helvetia Mining Company; and from a truck-dump facility receiving coal brought from various other Pennsylvania mines. The coal was delivered to the generating station facility by conveyor belts from the two adjacent mines to scales where it was weighed and sampled. The coal then moved by conveyor to a bin where it was combined and again sampled. It was then transported to a second bin on two conveyors, and then to an on-site coal cleaning plant where it was broken, crushed, sized, washed, cleaned, dried, and blended for the electric generation facility. The cleaning plant was located entirely at the generating station and was owned by Penelec and New York State Electric and Gas. However, the cleaning plant was operated under contract with the Iselin Preparation Company, a subsidiary of Rochester and Pittsburgh Coal Company. MSHA had previously inspected and otherwise exercised jurisdiction over the cleaning plant since 1977, but it had never regulated the conveyors used to move the processed coal leaving the cleaning plant and going to the generating facilities.

The dispute in Penelec concerned citations issued to Penelec by an MSHA inspector for failure to adequately guard the head drives of the conveyors in question to protect persons who might come in contact with the head rollers. Penelec did not dispute the fact that the cited guards were inadequate. It disputed the authority of the MSHA inspector to issue the citations claiming that it should be inspected and regulated by OHSA. Based on a joint stipulation of facts submitted by the parties to Judge Melick, he affirmed the citations and concluded that the conveyor head drives were a part of a facility that constituted a "coal or other mine" as defined by the Mine Act. Judge Melick also concluded that the coal processed at the cleaning plant for consumption in the Penelec generating station fell within the scope of "work of preparing coal" within the meaning of the Act, and that the head drives over which the coal passed on its way to the plant were "structures", "equipment", and "machinery" that was "used or to be used in" the "work of preparing the coal". Under all of these circumstances, Judge Melick concluded that "it is clear that the head drives of the 5A and 5B conveyor belts are indeed subject to the Secretary's jurisdiction under the Act." Secretary of Labor (MSHA) v. Pennsylvania Electric Company, 10 FMSHRC 1780, 1782 (December 1988).

On appeal of Judge Melick's decision, the Commission took note of the fact that MSHA's regulation of the working conditions inside Penelec's on-site cleaning plant, as well as the mines adjacent to the generating station that delivered coal directly to the station by means of the conveyor systems, were not challenged by Penelec. Although the Commission found that Mine Act jurisdiction attached to the two cited conveyor head drives in question, it found that "Because of the pervasive ambiguity in the record", it was unclear as to whether or not the cited working condition was enforced under the Mine Act, as argued by MSHA, or by regulations enforced by OSHA, as argued by Penelec, and it vacated Judge Melick's decision and remanded the case to him for further proceedings on the jurisdictional question presented and the entry of a new decision. Secretary v. Pennsylvania Electric Company, 11 FMSHRC 1875, (October 1989). In remanding the case, the Commission observed as follows at 11 FMSHRC 1884, 1885:

> At oral argument before us, counsel for the Secretary asserted that the MSHA district manager's letter reflects MSHA's policy of inspecting those areas of a power plant that involve the handling and processing of run-of-mine coal and of leaving to OSHA the inspection of those areas that involve the handling of previously processed coal. O.A. Tr. 28, 29-30, 33. We note, however, that in a prior case involving a coal handling power plant, the Commission was advised, by different secretarial counsel, that:
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> > MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.
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> Utility Fuels, Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss (November 29, 1985).
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> * * * * * * *
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> The importance of, and confusion concerning, the jurisdictional question presented in this case is further heightened by the fact that subsequent to the issuance of the citations in question, the Secretary through OSHA, proposed new, comprehensive safety standards applicable to the operation and maintenance of electrical power generation

> facilities. 54 Fed. Reg. 4974-5024 (1989). On their face, and as explained in the accompanying explanatory materials, these regulations would appear to directly apply to operations such as Penelec's including the coal handling aspects of such operations.
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> These conflicting indications of Secretarial intent raise serious questions as to which agency in the Department of Labor exercises safety and health authority over power generating stations such as Penelec's. The answer is of great consequence to Penelec and its employees. It is also of importance to similarly situated operators of coal burning electric utilities who, along with Penelec, must know which safety and health standards must be complied with and which statute prescribes the rights
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> and duties to which they and their employees must conform their conduct.
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> * * * * * * *
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> * * * Because of the pervasive ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station, and the importance of this question, we find it appropriate to order further proceedings. We encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OSHA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf. To do otherwise would be to ignore the potential whipsaw effects to which an employer can be subjected when important jurisdictional issues appear to be resolved with no assurance that potentially competing agencies have reached a mutual and definitive determination as to their respective roles.

On remand to Judge Melick, the Secretary of Labor took vigorous exception to the Commission's comments concerning the "internal decision-making processes and intrusion . . . into her reasons and motives for such decisions. . . ." 12 FMSHRC 123 (January 1990). The Secretary believed that she had sole discretion pursuant to the Mine Act to decide whether OSHA or MSHA should inspect the subject area of the mine based on "administrative convenience". Although Judge Melick found no basis for sanctions against the Secretary, he stated that "this does to mean that the Secretary's practices disclosed at hearings should be condoned or be found to be acceptable. Indeed the Secretary's past practice of determining MSHA inspection authority over the subject area . . . . is quite bizarre and

clearly unacceptable". 12 FMSHRC 123. Judge Melick found that once Penelec raised the issued of MSHA/OSHA jurisdiction, "the matter was resolved at the local level".

Upon reconsideration of the case, and in an evenly split decision, the Commission allowed Judge Melick's decision on remand to stand as if affirmed. 12 FMSHRC 152, 1563 (August 1990). The Commission reaffirmed its previous finding concerning Mine Act jurisdiction over the cited conveyor head drives. With respect to MSHA/OSHA jurisdiction, the Commission observed as follows at 12 FMSHRC 567-1568:

> The evidence produced by the Secretary on remand makes clear that the particular area in question has been inspected by MSHA since at least 1982 and no evidence was produced to show that OSHA has ever inspected it. As a consequence, the Interagency Agreement has no bearing on this case because no question or conflict between OSHA and MSHA existed. We now know that the Secretary has consistently inspected the head drives under the Mine Act rather than the OSHA Act. As discussed above, Penelec had notice of this fact.

Penelec filed an appeal with the Third Circuit, and the Court affirmed the Commission's decision. Pennsylvania Electric Company v. FMSHRC, 969 F.2D 1501 (3rd Cir. 1992). The court upheld MSHA's authority to regulate coal handling and processing areas at an electric power generating station, and it further held that the cited work activity was clearly antecedent to and separate from the process of producing electric power, and instead, constituted coal preparation. The court observed that "it is clear that Penelec's head drives come under the Mine Act jurisdiction, regardless of whether the facility receiving the coal for processing is also under Mine Act jurisdiction. We need only look to MSHA's regulation of the conveyors leading to the coal cleaning facilities to reach the proper decision in this case" 969 F.2d 1504.

Westwood Energy Properties v. Secretary of Labor (MSHA), 11 FMSHRC 105 (January 1989), concerned a large culm bank refuse pile located in Tremont, Pennsylvania on property owned by Westwood Energy, the operator of a power generating plant located on the premises. The plant was built on the site of an anthracite mine that ceased operations in 1947, and the culm pile was created as the refuse product of the previously operated mine and preparation plant. The pile contained coal mine refuse, including rock, slate, shale, wood, metal, both ferrous and nonferrous, granite, quartz, pyrite, and a small percentage of coal and other carbonaceous material. Westwood used the material in the culm pile as fuel to generate electrical power which was sold to the Metropolitan Edison Company. Westwood engaged a

contractor to remove the material from the Culm bank and load it into hoppers where wood and other materials larger than 12 by 12 inches were removed. Metal was removed by means of a magnet and a metal detector. The culm material was then transported to a silo and crushed in two steps to a particle size of one-eighth of an inch. It was then transported to the combuster where it was burned in a process called a circulating fluidized bed process of combustion. This process resulted in steam which drove turbines and created electrical power.

On October 27, 1987, MSHA inspectors appeared at the Westwood site seeking entry to conduct an inspection. Westwood took the position that it was a power generation facility not subject to MSHA's jurisdiction, and it denied entry to the inspectors. MSHA obtained a restraining order permitting the inspection, and the inspectors returned on November 14, 1987, conducted an inspection, and issued several citations. At the time of the inspection, the work was being done by Westwood's contractor and its 30 to 35 employees, but Westwood was in overall charge, and except for the question of jurisdiction, it did not dispute the violations.

Commission Judge James Broderick found that Westwood's activities were subject to the Mine Act and to MSHA's jurisdiction, and he affirmed the citations. Judge Broderick reasoned as follows at 11 FMSHRC 111, 115-116:

> The Secretary of Labor is given the initial responsibility for determining whether a facility is subject to the Mine Act. She is in a unique position to determine the dividing line between MSHA and OSHA jurisdiction, since both programs are administered by her. I assume that the issuance of citations by MSHA to Westwood reflects the Secretary's determination that the subject facility is a mine and therefore is subject to the Mine Act. Although such a determination is not binding on the Commission, it must be accorded great weight in our consideration of the jurisdictional question.
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> * * * * * * *
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> Westwood argues that "it is a power plant, pure and simple"; that it utilizes a stockpile of fuel as a conventional power plant would use a stockpile of coal. It consumes fuel and does not produce a marketable mineral. Westwood's argument emphasizes the latter distinction as if the marketing of coal or other mineral is essential to the idea of mining or coal preparation. But it is not uncommon for mine operators to themselves consume the products of their mines. And Westwood does more than burn the culm material; it

> prepares it "for a particular use." Elam, supra: it extracts the cul from the bank and loads it into hoppers, where certain waste materials are removed; it then transports it on a conveyor belt where ferrous metals are removed by a magnet; thereafter a metal detector seeks other metals which are rejected. The residual fuel is then crushed or sized to particles approximately one quarter inch in size. All this takes place prior to the fuel being introduced into the boiler building. These activities closely resemble the "work of preparing the coal" as defined in the Act.
>
> 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.
>
> I am further persuaded that Westwood's use of the culm includes the work of preparing the coal, since it breaks, crushes, sizes, stores and loads anthracite, and does other work of preparing coal usually done by the operator of a coal mine.
>
> In both of these conclusions, I am giving deference to the determination by the Secretary of Labor that Westwood's facility and operation are subject to the Mine Act.

Westwood appealed Judge Broderick's decision to the Commission. Westwood Energy Properties v. Secretary of Labor (MSHA), 11 FMSHRC 2408 (December 1989). Westwood contended that its operations at the culm bank were but one component of an operation of an electric generating facility subject to the OSHA Act, rather than the Mine Act. The Secretary asserted mine Act jurisdiction in connection with Westwood's culm bank activities, but did not assert Mine Act jurisdiction with respect to the working conditions inside the power generating facility itself, and it took the position that those activities were subject to OSHA jurisdiction. Westwood maintained that the entire facility, including the culm bank, was properly regulated by OSHA.

The Commission found that Westwood's activities fell within the Mine Act's definitions of "mine" or "work of preparing the coal", and it concluded that the Secretary had statutory authority to make safety standards applicable to the disputed

area. However, the Commission was unable to conclude from the record whether the Secretary chose to exercise her authority to regulate Westwood's operation under the Mine Act or the OHSA Act, and it remanded the matter to Judge Broderick for the taking of further evidence and the entry of a new decision. In remanding the matter to Judge Broderick, the Commission stated as follows at 11 FMSHRC 2414-2415:

> We conclude that Westwood literally engages in the "work of preparing the coal" in that the processes undertaken by Westwood on the mine waste material, including coal, are among those specified in the statutory definition. We further conclude that although Westwood does not undertake to prepare the coal contained in the mine refuse to meet market specifications, it does engage in the enumerated processes, as does the normal coal mine operator, for
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> the purpose of making the mined material suitable for a particular use; here, as a fuel to be consumed at an electric generating facility.
>
> Although Westwood further argues that it is exempt from Mine Act jurisdiction because it does not prepare the culm for resale but rather is the ultimate consumer of the culm, we rejected a similar "ultimate consumer" argument in Pennsylvania Electric. 11 FMSHRC at 1881. We noted that under the Mine Act consumers of coal who otherwise meet the applicable definition of "mine" or "work of preparing the coal" are not provided any per se exclusion from the Act's jurisdiction. We held instead that the determination of Mine Act jurisdiction is governed by the two part analysis first set forth in Elam and followed in subsequent cases. (footnote omitted).
>
> And, further at 11 FMSHRC 2419:
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> * * * *As we did in Pennsylvania Electric, we encourage the Secretary to give serious consideration to the questions raised by this case and to follow the procedures in the OHSA-MSHA Interagency Agreement to resolve the conflicting positions taken on her behalf.

On August 3, 1990, Judge Broderick issued his decision on remand, 12 FMSHRC 1625 (August 1990), when he approved a settlement submitted by the parties. Westwood agreed to pay civil penalty assessments in settlement of the contested citations, and Judge Broderick dismissed the case subject to payment by Westwood. The decision summarizes the settlement as follows at 12 FMSHRC 1625:

> The settlement agreement provides that Westwood will withdraw its contest proceedings and pay the $900 in civil penalties assessed in my decision of January 26, 1989. It further provides that MSHA will not assert jurisdiction over Westwood's facility in the future, so long as Westwood does not materially change the manner in which it processes culm as described in the Commission decision. If MSHA determines that a material change has occurred and decides to reassert its jurisdiction, it will so notify Westwood. Westwood does not admit MSHA's jurisdiction over any portion of the Westwood facility and its withdrawal of the notices of contest is without prejudice to its right to contest any future assertion of jurisdiction by MSHA.

Air Products and Chemicals, Inc. v. Secretary of Labor (MSHA), 13 FMSHRC 1657 (October 1991), concerned an electric generating facility (Cambria CoGen) utilizing two combustion boilers with bituminous coal refuse as its primary energy source to power a steam turbine generator. Air Products operated the facility, and its primary business was the production and sale of electricity to the Pennsylvania Electric Company, and the production of steam for a local nursing home. Air Products was cited with a violation of section 103(a) of the Mine Act for refusing to allow an MSHA inspector to enter its facility for an inspection. The matter was adjudicated by Commission Judge Gary Melick, and the issues included whether or not the facility areas in issue were a "coal mine" within the meaning of the Act and therefore subject to MSHA jurisdiction, and if so, whether MSHA exercised its authority in a manner sufficient to displace OSHA's enforcement authority.

Judge Melick described the process taking place at the facility as follows at 13 FMSHRC 1658:

> The fuel is obtained from bituminous coal refuse piles located at a mine owned by RNS Services, Inc. (RNS), and supplied by RNS. The coal refuse is delivered by truck to the Cambria CoGen facility and dumped into a hopper at the refuse receiving building. The product then passes through a grizzly which screens out large objects, including rock, slate, timbers, roof bolts, and large pieces of coal. The product is then transported to a refuse storage building and then conveyed as need to the Bradford breaker building. It is there fed onto a rotating Bradford drum breaker which further screens and sizes the material for easier handling and to prevent damage to other equipment in the facility.

> The remaining minus-6 inch material then proceeds onto the C-1 belt to a refuse storage dome. A stacker distributes the piles and a reclaim machine places coal on another conveyor as needed. The C-2 belt then transports coal to the crusher building where screens separate minus-2 inch material. That material is then further crushed to one-quarter inch to zero-inch size with a roll crusher. This product is then conveyed to the boiler building storage facility, where it is stored until conveyed to the boilers by way of the boiler plant feed belt. The Secretary acknowledges that MSHA jurisdiction would not extend beyond the point where the coal product is dumped onto the plant feed belt. (Emphasis added).
>
> In addition to refuse coal, run-of-mine coal is used in the boilers to maintain a proper mix of combustibility. This coal is delivered by truck and transported by belt to the run-of-mine coal storage tepee. That material then proceeds to the crusher building where it is screened down to one-quarter inch by zero-inch size. The material is then fed to the boiler building but stored separate and apart form the refuse coal for later mixing as needed for the boilers.

Citing the statutory definitions of a "coal or other mine", Judge Melick concluded that the cited areas came within Mine Act jurisdiction, and he stated as follows at 13 FMSHRC 1661:

> Within this framework, it is clear that in at least a portion of the Cambria CoGen facility cited by MSHA in this case, coal refuse is broken, crushed, sized, and/or cleaned in preparation for consumption in the generating facility. These activities are all within the scope of "work of preparing coal" within the meaning of section 3(i) of the Mine Act. It is also clear that the area at issue includes "structures," "equipment," and machinery" that are "used in or to be used in" the "work of preparing the coal." It is therefore clear that the areas cited in this case were indeed subject to Mine Act jurisdiction. In this regard it is also noted that Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood Energy Properties, 11 FMSHRC 2408 (1989), to be within Mine Act jurisdiction.

Notwithstanding his jurisdictional finding, Judge Melick further concluded that the Secretary failed to clearly designate whether OSHA or MSHA should exercise regulatory authority over the working conditions at the Air Products facility, and he cited the Commission's prior discussions in the Westwood Energy and

Pennsylvania Electric cases. Judge Melick concluded that the record before him failed to reflect "a reasoned resolution of the jurisdictional questions by the Secretary and her agencies", and that MSHA's inspection of the facility "simply resulted from an ad hoc unilateral assertion of jurisdiction by MSHA". 13 FMSHRC 1663. Under all of these circumstances, Judge Melick vacated the contested citation issued to Air Products, and both parties appealed the matter to the Commission. The Commission granted review on November 15, 1991, 13 FMSHRC (November 1991), and the matter is still pending.

Petitioner's Arguments

In support of its motion for summary judgment in the instant cases, the petitioner maintains that the respondent's operations are subject to Mine Act jurisdiction under two separate statutory provisions. First, petitioner asserts that the respondent is an "operator" under section 3(d) of the Act because it is an "independent contractor . . . performing services" at a mine. Second, petitioner believes that the respondent is subject to the Act because an analysis of the functions it performs requires the conclusion that its entire operations preceding the entry of the gob into the plant building must be considered a "coal or other mine" under section 3(h) of the Act because its operations perform the "work of preparing the coal" under section 3(i) of the Act.

Petitioner points out that all of the contested citations and orders that are the subject of these proceedings were issued for violative conditions found on the North Branch Mine property. MSHA concludes that the operations taking place on North Branch's property clearly constitute "a coal or other mine" as that term is defined in section 3(h) of the Act, citing Secretary of Labor, MSHA, v. Westwood Energy Properties, 11 FMSHRC 2408 (1991) (culm bank is a "mine"); Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986) (coal refuse pile is a "mine").

Citing Secretary of Labor, MSHA v. Otis Elevator Co., 11 FMSHRC 1896 (October 1989), aff'd, 921 F.2d 1285 (D.C. Cir. 1990); National Indus, Sand Ass'n. v. Marshall, 601 F.2d 289 (3rd Cir. 1979); and Old Dominion Power Co., v. Secretary of Labor, 772 F.2d 92 (4th Cir. 1985), petitioner asserts that an independent contractor's proximity to the mining process, and the extent of its presence at the mine, are critical factors in determining whether an independent contractor is an "operator" under the Act. Petitioner further relies on the Commission's decision in Secretary of Labor, MSHA v. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1357 (September 1991), holding that an independent trucking company hauling a substantial amount of coal from a mine to an electric generating station was the exclusive coal hauler between the mine and the station, and that these services constituted essential services closely related to

the coal extraction process subjecting the trucking company to jurisdiction under the Act and to MSHA's enforcement jurisdiction.

Petitioner points out that the conveyor system operated and maintained by the respondent is the exclusive means of transportation for substantial amounts of gob from the mine refuse area to the plant which is the only customer for the gob. Under the circumstances, the petitioner concludes that the respondent's operations on the North Branch Mine property clearly perform an essential service for the mine. Petitioner further concludes that the extent of the presence of the respondent on the mine property must also be held to be clearly sufficient. In support of this conclusion, petitioner points out that the conveyor and related equipment have been continually present at the mine refuse area since their construction, and they are expected to continue their presence there for the next ten years. Further, the petitioner asserts that the respondent's employees must frequently and regularly enter on the mine property in order to clean the grizzly conveyor magnet each day, adjust the isolation gate in the end plate of the dozer trap, inspect, maintain, and repair the conveyor belt system, and clean up spills around the conveyor belts.

In support of its argument that the respondent is an "operator" because it operates, controls and supervises the coal mine operations of the power plant at that property, the petitioner asserts that the respondent's work activities preceding the entry of the gob into the power plant building are the same as those found by the Commission to constitute the "work of preparing the coal" in Westwood Energy Properties, supra. In support of this conclusion, the petitioner relies on the fact that the gob is excavated by bulldozers, then subjected to a series of filters to remove the larger particles. Because the plant uses the same circulating fluidized bed process as in Westwood to burn the gob, the gob is broken and crushed to a small uniform size no greater than one-quarter (1/4) of an inch. After the gob is cleaned through the use of magnets which removes the metal, it is stored in hoppers at the truck dump and in the crusher building, where it is gradually released into crushers. Under all of these circumstances, the petitioner asserts that the Westwood decision demands the conclusion that the processes undertaken by the respondent on the mine gob waste material, including coal waste, constitutes the "work of preparing the coal" because they are among the processes specified in the statutory definition.

The petitioner also relies on the Third Circuit's holdings in Pennsylvania Electric Co., supra, that the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation "usually done by the operator of a coal mine", 969 F.2d at 1503, and that this was true "regardless of whether

the facility receiving the coal for processing is also under Mine Act jurisdiction", 969 F.2d at 1504. Petitioner concludes that the Court's holding demands that the entire conveyor system outside of the power plant building be found to be a "coal or other mine", including the portion of the conveyor belt system operated and maintained by the respondent in the instant proceedings on mine property. Since the entire operations of the respondent, preceding the entry of the gob into the plant building, constitute the "work of preparing the coal" as defined in Section 3(i) of the Mine Act, petitioner concludes that these operations are a "coal or other mine" under Section 3(h) of the Act, and that it had jurisdiction under the Act to issue the citation and orders for the conditions found at the respondent's operations being conducted on the North Branch Mine property.

Respondent's Arguments

Citing the Mine Act statutory definitions of "coal or other mine" and the"work of preparing coal", the respondent asserts that it is clear from the definitions and the scope of the Act that a two (2) step analysis is applicable in determining whether its activities fall within the Act; namely, (1) which if any, of the enumerated processes apply to the respondent's operations, and (2) whether the enumerated processes are undertaken "as is usually done by the operator of a coal mine". The respondent believes the relevant issue is whether the coal is being prepared for commercial purposes. Citing the Commission's decision in MSHA v. Oliver M. Elam, Jr., 4 FMSHRC 5 (January 7, 1982), the respondent points out that the Commission recognized that the generally broad interpretation of the Act has certain limits, and that simply because an operator in some manner handles coal does not mean that its operations constitute a "mine" subject to the Act. The respondent further points out that the Commission has acknowledged that it is not sufficient to check-off whether the enumerated processes are being performed, and that the nature of the processes must also be considered.

The respondent asserts that the Commission followed the aforementioned two-step process in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), and Donovan v. Inland Terminals, Inc., 3 MSHC (BNA) 1893 (DC SD Ind., March 28, 1985), in determining whether the enumerated coal processes were being performed in order to release the coal into the chain of commerce. Respondent also cites the Pennsylvania Electric Company decision, supra, in support of its argument that the performance of listed work activities and the nature of the operation performing those activities are relevant in determining whether "coal preparation" is taking place.

Acknowledging the fact that the legislative history of the Act reflects that the statutory definitions should be given the broadest possible interpretation, the respondent concludes that

Congress never intended for ultimate consumers of coal, like the plant in question, to be regulated by the Act, and that the Congressional intent was to regulate only traditional mines, and to establish a single mine safety and health law applicable to all mining activity. Citing and quoting Commissioner Doyle's dissent in Pennsylvania Electric Company, 11 FMSHRC 2t 1889-1890, the respondent argues that there is no indication of any Congressional intent to "follow the coal wherever it may go" and to regulate other industries such as electric utilities or steel mills. The respondent maintains that coal-fired power plants have historically been regulated by OSHA rather than MSHA, even though the plants engage in many of the enumerated processes defined as the "work of preparing coal" under the Mine Act. Accordingly, the respondent concludes that the Act has consistently been construed as less than all-encompassing, and that Congressional acquiescence in this interpretation is conclusive evidence that MSHA's insistence that it has jurisdiction over the power plant in the instant proceedings is inconsistent with years of prior policy.

The respondent asserts that the applicable definitions of "coal mine" and "work of preparing the coal" at issue in these proceedings also apply to cases decided under the Black Lung Benefits Act, 30 U.S.C. 901-945, a subchapter of the Mine Act. Citing several cases decided in the context of black lung disability claims, the respondent argues that unless a commercial purpose is involved, the phrase "preparation of coal" has no application. The respondent cites the case of Wisor v. Director, OCWP, 748 f.2d 176, 179 (3rd Cir. 1980), as a holding by this Commission that the definition of a coal mine "includes a commercial purpose requirement".

The respondent asserts that the Court majority in the Pennsylvania Electric Company case misconstrued the two black lung cases it relied on in reaching its decision. The respondent maintains that if the Commission accepts MSHA's contention that its operations constitute "the work of preparing coal" based upon the occurrence of the previously discussed enumerated processes, then the Commission must totally disregard any exception for the ultimate consumer of coal, a result that the respondent believes would extend Mine Act jurisdiction far beyond the point intended (quoting from the dissenting judge in the Pennsylvania Electric Company case).

The respondent further argues that reliance on an evaluation of the presence of enumerated processes without an assessment of the nature of the operation in terms of whether it is the ultimate consumer of the coal would require that at least that portion of any business which uses coal would be subject to the Act. The respondent concludes that an abandonment of the "ultimate consumer stream of commerce" test would not provide any reasonable guidance in future cases on the issue of where milling

preparation ends and manufacturing begins. Citing Old Dominion Power Company, supra, at 772 F.2d 99, the respondent further concludes that accepting the position of the petitioner with respect to MSHA's enforcement jurisdiction would also have potentially serious safety consequences. For all of the reasons noted, the respondent believes it is evident that its activities do not constitute the "work of preparing coal" as contemplated by the Mine Act, and that the Act is not applicable.

MSHA vs. OSHA Enforcement Jurisdiction

As an alternative argument, the respondent maintains that MSHA has failed to exert its regulatory authority in such a manner as would preempt OSHA jurisdiction. Citing Columbia Gas of Pennsylvania, Inc., v. Marshall, 636 F.2d 913, 915-16 (3rd Cir. 1980), the respondent maintains that in order to preempt OSHA's jurisdiction, MSHA must specifically show that it has exercised its authority by promulgating regulations in the

disputed area, and that these concurrent regulations cover specific "working conditions" purportedly within OSHA's jurisdiction.

The respondent asserts that a review of the regulatory history regarding the power plant in question fails to demonstrate that the Secretary of Labor has consistently and unequivocally exercised authority under MSHA. The respondent points out that even if one were to presume that MSHA has promulgated regulations which apply to its operations, in the totality of the circumstances existing at the time the subject citations and orders were issued, it could not reasonably have been known that it was subject to regulation under MSHA. In support of its position, the respondent cites the following:

1. The April 17, 1979, MSHA OSHA Interagency Agreement, drawn up to apprise facilities of the limits of MSHA jurisdiction, cited facilities closely related to traditional mining activities as examples of facilities included within MSHA jurisdiction, and the issue of jurisdiction over coal handling at electric plants was not specifically addressed.

2. In a November 29, 1985, Motion to Dismiss filed with the Commission in Utility Fuels, Inc., Docket No. CENT 85-89, Counsel for the Secretary represented that:

   "MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite a particular memorandum incorporating this policy, MSHA and its predecessors have

consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power and that the power plant process is more feasibility regulated by OSHA." 969 F.2d 1501, 1515 (3d. Cir. 1992).

3. On January 31, 1989, OSHA issued proposed Rule 29 C.F.R.1910, relating to Electric Power Generation, Transmission, Distribution and Electric Protective Equipment. In the proposed Rule, OSHA stated that the rule was intended to cover work practices at "[f]uel and ash handling and processing installations such as coal conveyors and crushers." 54 Fed. Reg. 4973-5024 (Jan. 31, 1989).

4. On January 28, 1989, at oral argument in Westwood Energy Properties v. Secretary of Labor, MSHA, 11 FMSHRC 2408 (Dec. 1989), counsel for the Secretary stated that coal consumers such as steel mills and aluminum plants may be subject to the Mine Act jurisdiction if they engage in coal processing activities. However, even though Westwood did engage in such activities, MSHA settled the case and declined to assert jurisdiction. (MSHA has refused to settle the present dispute in a similar manner.)

5. During construction of the plant in question in these proceedings, plant officials met with OSHA representatives to discuss the functions of plant and compliance with applicable OSHA regulations.

6. The plant in question in these proceedings was constructed in compliance with OHSA standards and specifications, and OSHA asserted jurisdiction over the plant by conducting inspections.

7. In August, 1991, MSHA inspected the dozer trap and portion of the conveyor system which is located on Island Creek Coal Company's property for the first time. At that time, the dozer and the conveyor system were being

operated by Wiley Construction Incorporated. This inspection was the result of an individual inspector's decision to carry out the inspection after having being asked about it while inspecting the North Branch Mine, and it was not the result of any Secretarial policy decision, nor the result of any MSHA/OSHA agreement at the District Manager level pursuant to the Interagency Agreement, nor the result of any decision by the MSHA District Manager that such an inspection was within MSHA's jurisdiction.

8. On September 5, 1991, counsel for North Branch Partners wrote to OSHA's Area Director requesting that a jurisdictional determination be made pursuant to the MSHA/OSHA Agreement that OSHA had inspection and enforcement jurisdiction over the power plant in question. A response was received on April 8, 1992, indicating that both MSHA and OSHA would have jurisdiction over the power plant and that MSHA's jurisdiction would stop at the property line. The respondent does not believe that the OSHA response was a definitive response to counsel's inquiry as contemplated by the OSHA/MSHA Interagency Agreement.

9. In between the time of the requested OSHA determination noted in paragraph eight (8), and the response thereto, MSHA again inspected the power plant's dozer hopper and the portion of the conveyor system located on Island Creek property, and one citation and four orders were issued by MSHA on February 26, and 27, 1992.

10. At the time the subject citations and orders were issued by MSHA, no official Department of Labor policy existed which assigned coal handling and processing activities undertaken by an electric utility to MSHA's jurisdiction. In fact, the inspectors who actually issued the citations and orders were and are themselves unsure of the limits of their jurisdiction, as evidence by the fact that their inspections stopped at what they perceived to be the property line even though the coal handling and processing activities undertaken above the property line were

essentially the same as those undertaken below the property line.

11. Before the last two orders which are at issue in these proceedings were issued on May 12, 1992, and August 27, 1992, respondent's counsel specifically requested counsel for the Secretary to apprise it of the status of interagency negotiations regarding whether MSHA or OSHA would have jurisdiction over the operations conducted by the respondent . Such information was sought through the discovery process in this case, and the Secretary objected, based on a "interagency predecisional deliberative process privilege." The respondent concludes that the Department of Labor had not (and still has not) made up its own mind which agency, MSHA or OSHA, should regulate the activities of the respondent.

12. The respondent points out that while insisting that it has jurisdiction over the coal handling processes and the conveyance of coal at the plant in question, MSHA has not asserted jurisdiction over similar operations which are regulated by OSHA. As an example, the respondent asserts that similar coal handling and conveyor processes and procedures at the AES Beaver Valley Power Plant (as documented by a videotape, Exhibit F), are regulated entirely by OSHA and not MSHA.

The respondent also cites the following relevant deposition testimony of MSHA'S inspectors: (1) Inspector Darios' admission that MSHA does not inspect power plants but does inspect the conveyance system that transport coal to some power plants; (2) Inspector Ryan's admission that MSHA inspects coal delivery processes going to the Mt. Storm Power Plant, but asserts no jurisdiction once the coal is delivered; (3) Inspector George's admission that he had never been in a power plant until the day prior to his deposition when he toured the plant in question in these proceedings, and his belief that MSHA has a duty to inspect any coal handling or conveyance procedures that are similar to those at the plant; and (4) Inspector Fetty's admission that he had never inspected any power plant previous to his inspections in these cases, and that his prior power plant inspections were of the systems that delivered the coal to the plant.

The respondent believes that it has been given conflicting signals about its obligations under the Mine Act, and it

concludes that the evidence does not demonstrate that it knew when the citations and orders were issued that its operations were subject to MSHA citation. Further, since the Secretary has failed to issue the findings of his interagency negotiations with respect to MSHA/OSHA jurisdiction, the respondent concludes that "the regulatory confusion highlighted by this case has yet to be resolved". The respondent further concludes that the Secretary's position in these proceedings is unreasonable in that it leaves the plant operator in the position of being required to guess what the Secretary's regulatory position will be on any given day, and that position, may, in fact, vary in different areas of its operation.

The respondent further contends that overlapping authority by MSHA and OSHA at the plant would result in inconsistent standards mandating significant differences in the design of equipment, and employee work safety rules and training. Under the circumstances, and assuming that MSHA has jurisdiction, the respondent suggests that before any citations and/or orders can be upheld, the Secretary must provide a clear statement regarding the jurisdictional limits for prospective enforcement. In support of this position, the respondent cites Air Products and Chemicals, Inc., supra, where Judge Melick vacated a citation because the Secretary failed to clearly designate whether MSHA or OSHA should exercise regulatory authority.

In conclusion, the respondent acknowledges that deference is to be accorded interpretations by the agency charged with enforcing a law. However, in the instant proceedings, the respondent takes the position that the Secretary is not entitled to such deference because his attempts to assert jurisdiction over electric power generating plants, or to put the operators of such facilities on notice of liability under the Mine Act, did not occur until the late 1980's, well after the 1978 effective date of the Act. Further, the respondent believes that it is clear from the record in these proceedings that the first efforts toward inspecting its facilities came from a single inspector, and subsequently his District Manager in 1991, and there is no indication that their efforts represent the Secretary of Labor's interpretation of the Act. Because the Secretary of Labor's interpretations are both late in coming and inconsistent, the respondent asserts that any deference that would ordinarily be due the Secretary in interpreting the Act is not appropriate in this instance. Accordingly, the respondent suggests that even assuming that Mine Act jurisdiction attaches, the citations and orders should nonetheless be vacated.

Findings and Conclusions

The Jurisdictional Question

These proceedings are the result of MSHA's inspection of that portion of the gob conveyor belt that extends approximately 300 to 500 feet on to the North Branch Mine and preparation plant owned by Island Creek Coal Company and operated by its affiliate, the Laurel Run Mining Company. Although the respondent asserts that the mine and preparation plant are no longer in operation, it is undisputed that the mine was operational at the time the MSHA inspectors conducted their inspections and issued the violations. The mining operation included the aforesaid portion of the belt, a preparation plant, and the refuse and gob pile, all of which were within the confines of the mine, and not on property owned by the respondent or the owners and operators of the power plant.

It does not appear from the record before me that the respondent has any ownership interest in the power plant, plant equipment, the conveyor belt, or the gob that is transported from the North Branch Mine gob pile to the power plant site. Based on the available information, including the undisputed facts, the respondent has a continuing services agreement with NB Partners Ltd., the partnership entity that constructed and manages the power plant, to provide the labor and material for operating the plant and servicing and maintaining the belt conveyor system. The respondent has approximately 150 similar service contracts worldwide. The Island Creek Coal Company, the Laurel Run Mining Company, and NB Partners Ltd., are not parties in these proceedings, and the civil penalty proceedings were initiated against the respondent United Energy Services, Inc.

Section 4 of the Mine Act provides as follows: Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervisors a coal or other mine or any independent contractor performing services or construction at such mine." (Emphasis added).

MSHA's Independent Contractor regulations, which provide certain requirements and procedures for contractors to obtain MSHA identification numbers, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c): "'Independent Contractor' means any person, partnership, corporation,

subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *"

The Commission's decision in Secretary of Labor, MSHA, v. Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1357 (September 1991), summarizes the basis for coverage of independent contractors under the Act.

> Section 3(d) of the Mine Act expanded the definition of "operator" previously contained in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) ("Coal Act"), to include "any independent contractor performing services or construction at such mine." The legislative history of the Mine Act demonstrates that the goal of Congress in expanding the definition of "operator" was to broaden the enforcement power of the Secretary to reach a wide range of independent contractors, not just owners and leases. The Report of the Senate Human Resources Committee explained that the definition of operator was expanded in order to "include individuals of firms who are . . . engaged in construction at such mine, or who may be, under contract or otherwise, engaged in the extraction under contract or otherwise, engaged in the extraction process . . . ." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor of the Committee on Human Resources, 95th Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act o 1977, at 602 (1978) (Legis. History.")
>
> The Conference Report likewise explained that the expanded definition "was intended to permit enforcement" of the [Mine] Act against independent contractors "performing services or construction and "who may have a continuing presence at the mine." S. Conf. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315. The Commission has consistently recognized that the inclusion of independent contractors in the statutory definition reflects a Congressional purpose to subject such contractors to direct MSHA enforcement under the Mine Act. [Citation omitted].

In Otis Elevator Company, (Otis I), 11 FMSHRC 1896 (October 1989), and Otis Elevator Company, (Otis II), 11 FMSHRC 1918 (October 1989), aff'd, 921 F.2d 1285 (D.C. Cir. 1990), the Commission affirmed two decisions by the presiding Judges holding that an elevator service company that inspected, serviced, and maintained a mine elevator under a contract with the mine operator was an independent contractor "operator" subject to the Act and to MSHA's enforcement jurisdiction. The Commission

affirmed the Judges' findings that Otis had a continuing, regular, and substantial presence at the mine site performing services on an elevator which was a key facility and essential ingredient involved in the coal extraction process. In making its determination, the Commission reviewed the case laws regarding independent contractors, including National Indus, Sand Ass'n v. Marshall, 601 F.2d 289 (3rd Cir. 1979), and Old Dominion Power Co. v. Secretary of Labor, 772 F.2d 92 (4th Cir.), relied on the expanded definition of "operator" found in the Act, and examined the independent contractor's proximity to the extraction process and the extent of its presence at the mine to determine whether the independent contractor was an operator under the Act. This same analysis is relevant and appropriate in these proceedings.

I conclude and find that the operations taking place at the North Branch Mine property, when the violations were issued, including the mine preparation plant and refuse or gob pile, constitute a "coal or other mine" as that term is defined in section 3(h) of the Act. Secretary of Labor, MSHA v. Westwood Energy Properties, supra; Consolidation Coal Co. v. FMSHRC, 3 BNA MSHC 2135 (4th Cir. 1986). Respondent's material handling supervisor James Bowman, confirmed that the gob that is transported to the power plant over the conveyor belt system is a waste product from the coal (Deposition, Tr. 91). Plant Manager Robert Seavey, who is employed by the respondent, acknowledged that the "mine extraction" process takes place at the North Branch mining facility, and that the gob, or refuse, is the by-product of the mined coal after it has been processed through the mine preparation plant, and that the respondent accepts the gob or refuse material, from Island Creek Coal Company (Deposition, Tr. 44, 54, 59).

The undisputed facts reflect that the gob that is transported by the conveyor belt system to the power plant is the product of coal mining which has taken place at the North Branch Mine. After the sale of the marketable mined coal, the remainder is transported to the mine refuse pile from the mine preparation plant. The gob is sold to NB Partners Ltd. by Laurel Creek Mining Company, and it must meet certain essential contract specifications. The bulldozers used at the gob pile to facilitate the loading of the gob onto the conveyor belt for transportation to the power plant are owned by either island Creek or Laurel Run, and the bulldozer operators are employees of Laurel Run.

According to Mr. Seavy, the respondent entered into the services agreement in the fall of 1988, had employees in place at the facility in the fall of 1989, and that substantial completion of the plant took place in late spring of 1991, when the conveyor belt system began transporting the gob from the pile to the plant. The gob pile extends for a distance of one mile, and it

is estimated that the conveyor belt system will supply the power plant for at least the next ten years. The gob is provided exclusively to the power plant for its use in generating electricity, and the exclusive means of transporting the gob is by the conveyor system in question.

Mr. Seavy's deposition testimony confirms that the respondent maintains and services the conveyor belt system pursuant to the continuing services agreement with NB Partners Ltd. (Tr. 16-17). Although Mr. Seavey denied an contractual relationship between the respondent and owners and operators of the North Branch Mine (Island Creek and Laurel Run), he testified that the respondent is authorized to operate the conveyor belt on Island Creek's property as part of the continuing services agreement. Although "he's been told" that an easement has been granted, he has never seen it in writing (Tr. 21-22).

The deposition testimony of respondent's material handling supervisor, James Bowman, whose duties include the supervision of sixteen (16) material handlers employed by the respondent, establishes that these employees perform maintenance on the belt conveyor and associated equipment, such as the dozer trap, on a regular basis, and that the work includes the greasing of bearings and belt conveyor rollers, and making repairs to the belt as necessary (Tr. 23, 60, 62, 90). Mr. Bowman testified that he visually observes the dozer trap door once every two weeks, that at least one or two employees work in that area, and they would observe the trap door every day, and that all of the 16 employees working for him take turns working at the dozer feeder and trap areas (Tr. 28-30). He confirmed that the respondent's employees clean up the spills from the conveyor belt at the refuse pile area (Tr. 64). He also confirmed that as the gob material is used up as gob feeding is taking place at the bottom of the gob pile, the dozer trap will be moved up the conveyor line, and it will eventually reach the power plant property line in approximately 10 years (Tr. 88-98).

In view of the foregoing, I conclude and find that at the time the violations were issued in these cases, the respondent had a continuing presence on the North Branch Mine property performing services at that mine. Although the respondent's presence at the mine was by virtue of its service contract with NB Partners, Ltd., rather than Island Creek or Laurel Run Mining Companies, the owners and operators of the mine, I find nothing to rebut the strong inference that the respondent's presence on mine property had the approval of Island Creek and Laurel Run. Indeed, the additional posthearing discovery by the parties reflected the existence of an unsigned easement agreement between Laurel Run and NB Partners, LTD., which was apparently not adopted in lieu of the services agreement. In any event, notwithstanding the absence of any contractual relationship between the respondent and Laurel Run or Island Creek, I still

conclude and find that the respondent had a continuing presence at the North Branch Mine performing services at that mine within the meaning of section 3(d) of the Act, at the time the violations were issued.

In addition to the respondent's continuing presence at the North Branch Mine, I conclude and find that there is a sufficient nexus between the work and services performed by the respondent with respect to the operation of the conveyor belt system, including the servicing, repairing, cleaning, and maintaining the belt system, and the coal extraction and coal processing and stockpiling that have taken place at the mine preparation plant, and the gob refuse pile. The services performed by the respondent are essential, not only to the power plant that depends on a steady supply of gob to fuel its boilers, but they are also essential to, and closely connected with, the extraction of the coal that is processed through the mine preparation plant and rendered into a saleable product that produced income for Island Creek and Laurel Run. Since the power plant is the only customer for the gob, and is dependent on delivery by the conveyor belt system in question, the exclusive means of transporting the gob from the mine refuse pile to the power plant, it is essential that the conveyor belt system be maintained in serviceable condition in order to insure a regular supply of fuel for the power plant. Without the delivery of a steady supply of fuel over a dependable and well-maintained belt conveyor system, it seems obvious to me that the power plant will not stay in business very long, and Island Creek and Laurel Run could conceivably lose its sole customer to whom it sells its gob.

On the basis of the foregoing findings and conclusions, and after careful consideration of the arguments advanced by the parties, I conclude and find that at the time the violations were issued to the respondent at the North Branch Mine property, the respondent was an independent contractor performing services at that mine pursuant to section 3(d) of the Act, and it was accordingly subject to the jurisdiction of the Act as well as the inspection and enforcement jurisdiction of MSHA while performing these services on mine property.

The respondent's suggestion that MSHA is confused and has not yet made up its mind as to where its jurisdiction lies is not well taken, and it is rejected. I take note of the fact that in response to an inquiry of June 25, 1992, from the respondent's plant manager Robert E. Seavey, MSHA's District Manager, Ronald L. Keaton, advised Mr. Seavey by letter dated July 13, 1992, that "MSHA's position is that you are under our jurisdiction any time that you are working on coal mine property".

I have carefully reviewed the depositions of MSHA Inspectors Darios, Fetty, Wilt, and George, and I find no evidence of any confusion on their part with respect to the areas they were to inspect while at the North Branch Mine. Although Inspector Darios mentioned some confusion created by information supplied by an Island Creek employee as to whether or not the conveyor belt was on mine property, and Inspector Fetty mentioned a "controversy" generated by his inability to obtain any definitive information from Island Creek as to who was in charge of the refuse pile, all of the inspectors apparently knew that their inspections were to be confined to mine property and that they were not to venture beyond a certain property "boundary line" delineated by a boot bridge which marked the dividing line between mine property and power plant property. Further, the depositions of Supervisory Inspector Barry Ryan and Inspector Wilt, the individual who initially inspected the refuse area, reflects that they were not confused as to the metes and bounds of their inspection and enforcement jurisdiction on mine property. There may have been some confusion as to where mine property may have begun and ended, who owned the equipment, or whether a piece of equipment was on or off mine property, but I find no confusion about the fact that MSHA's inspection jurisdiction terminated at the power plant property line and that this was clear to the inspectors, as well as to the respondent.

The respondent's position seems to be that the entire belt conveyor system, as one self-contained piece of equipment, is part and parcel of the power plant and not subject to MSHA's inspection and enforcement jurisdiction. Such a notion is rejected. Although MSHA's inspectors have inspected the North Branch Mining operations, as well as that portion of the conveyor belt located on mine property, the inspections have stopped short of the point where the belt bisects the property line separating mine property and the power plant property. Further, the issue as I view it, is whether or not the respondent, as an independent contractor "operator" pursuant to the act, may be held accountable and liable or violations and penalty assessments for violations occurring in the course of its contractor work performed on mine property. I have concluded that the answer to this question is "Yes".

The respondent's assertion that MSHA has not established that it has preempted OSHA's jurisdiction is not well taken and it is rejected. It seems clear to me that MSHA has always exercised its inspection and enforcement jurisdiction over all mining activities taking place at the North Branch Mine, and has issued violations to Island Creek Coal Company as well as a previous contractor (Wiley Construction Co.) for violations on mine property. It also seems clear to me that MSHA exercised its inspection and enforcement jurisdiction in these proceedings when it issued the violations for conditions observed by the inspectors on mine property and that it is seeking civil penalty

assessments for those violations, rather than any violative conditions observed and cited on power plant property.

Insofar as the power plant property is concerned, particularly with respect to whether MSHA or OSHA will exercise jurisdiction, the record reflects that negotiations are still taking place pursuant to the OSHA-MSHA Interagency Agreement, and the petitioner asserts that it has specifically refrained from exercising jurisdiction over any power plant facilities on plant property until a decision is reached pursuant to the Agreement. Pending that determination, the petitioner concludes that the facts presented in these proceedings establish that the cited violative conditions were and are under MSHA's jurisdiction, and that the respondent should be held accountable and liable for the violations and the proposed civil penalty assessments for those violations.

The petitioner asserts that in addition to being an independent contractor performing services at a mine, the respondent is also a mine operator in its own right pursuant to the Act because it operates, controls, and supervises the coal mine operations of the power plant at the North Branch Mine Property. The petitioner views that portion of the conveyor belt located on the North Branch Mine property, together with the remainder of the belt conveyor system transporting the gob to the power plant, and the associated equipment used to process the gob

as it moves on its way to the power plant along the conveyor belt system, to be a coal mine operation that provided the jurisdictional basis for the issuance of the violations.

It would appear from the facts in these proceedings that the processing and treatment of the gob material that is transported from the North Branch mining operation over the conveyor belt system to the power plant is subjected to the same type of pre-burning processes as were presented in the Westwood Energy Properties and Pennsylvania Electric Company cases, supra. However, unlike those cases, where the civil penalty proceedings were initiated against the power plant owners and operators for violations on plant property, MSHA, in the instant proceedings, issued the violations for conditions found off power plant property, and has instituted penalty proceedings against the respondent as an independent contractor and not against NB Partners Ltd., the power plant owner. Further, although the respondent suggests that it is an electric utility, I find no evidence that it has any ownership interest in the power plant or its equipment, and it would appear that the true ownership of the utility lies with NB Partner Ltd., or the bank that apparently holds the mortgage, none of whom are named as parties in these proceedings. Under these circumstances, I do not find it appropriate or necessary to expand my jurisdictional finding

beyond my conclusion that the respondent is an independent contractor subject to the Act and to MSHA's enforcement jurisdiction.

The Alleged Violations

Docket No. WEVA 92-916

This case concerns a section 104(d)(1) citation and three section 104(d)(1) orders issued on February 26, 1992, alleging violations of the equipment guarding requirements found in mandatory safety standards 30 C.F.R. 77.400(a), (c), and (d).

In its answer of August 17, 1992, to the petitioner's civil penalty proposals, the respondent stated that it did not contest the violations but did contest MSHA's jurisdiction over its operations. The respondent made the same responses in its August 17, 1992, replies to the petitioner's interrogatories.

In its response of August 31, 1992, to the petitioner's request for an admission that the description of the conditions or practice upon which the citation and orders are based, as stated in sections 8 and 15 of the citation and orders ("Condition or Practice" and "Area or Equipment"), are true and accurate, the respondent replied that it did not contest the citation or orders and only contested MSHA's enforcement jurisdiction (Admission No. 12). In response to several requests for admissions with respect to the inspectors gravity, negligence, "S&S", and unwarrantable failure findings (Admission Nos. 13 through 18), the respondent simply incorporated by reference its response to Admission No. 12, which states that "United Energy does not contest the citation and/or orders. United Energy contests MSHA's assertion of jurisdiction."

In a facsimile letter of September 1, 1992, to the petitioner's counsel regarding the consolidation of Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, respondent's counsel stated part as follows:

> This is to memorialize our recent telephone conversations regarding consolidation of the above-referenced petitions. You and I have agreed that it is logical to consolidate the three (3) petitions because United Energy is contesting jurisdiction rather than the underlying citations and/or orders. Therefore, I will file a motion to consolidate as soon as possible. Also, because the discovery responses in case 961 would be essentially identical to the responses already made in case 916, I do not plan to file responses to the Secretary's First Request for Admissions, Second Request for Production or Secretary's Second Set of

> Interrogatories in case 961. If you have any objections to the foregoing, please notify me as soon as possible. (emphasis added).

In its April 1, 1993, opposition to the petitioner's summary judgment motion, the respondent states as follows with respect to each of the violations:

> United Energy does not dispute that on February 26, 1992, three employees of United Energy were shoveling at the number two gob conveyor belt tailpiece while the guarding was removed from the tailpiece along the roadside. Further, United Energy does not dispute MSHA Inspector Joseph W. Darios' evaluations as set forth in blocks 10.A, 10.B and 10.D and of said citation. (Citation No. 3120276).
>
> United Energy does not dispute that on February 26, 1992, the rear tailpiece guard of the grizzly tail pulley operated by United Energy, was not in place and was exposing the roller or pulley at the rear, with the rear tailpiece guard lying on the ground behind the belt assembly. (Order No. 3120277).
>
> United Energy does not dispute that on February 26, 1992, a side guard of the grizzly belt tail pulley operated by United Energy was not provided, and was exposing the roller or pulley at the side. (Order No. 3120277).
>
> United Energy does not dispute the evaluations of Inspector Joseph W. Darios' contained in blocks 10.A, 10.B, and 10.D of Order No. 3120277.
>
> United Energy does not dispute that the cover guard for the grizzly gob feeder chain drive operated by United Energy was not in place and was exposing the chain drive sprockets and chain drive located at the rear side of the grizzly belt assembly near the tailpiece with the rear tailpiece guard lying on the ground behind the belt and assembly as set forth in Order No. 3120278.
>
> United Energy does not dispute the evaluations of MSHA Inspector Joseph W. Darios contained in blocks 10.A, 10.B and 10.D of Order No. 3120278.
>
> United Energy does not dispute that on February 26, 1992, guarding for Gob Movable 1 conveyor belt take-up pulley operated by United Energy did not extend a sufficient distance sufficient to prevent contact by and/or injury to persons, with the rear side of the

tail pulley at the side being exposed approximately six (6) inches past the guarding provided and permitting contact at the pinch point of the roller and belt, as set forth in Order No. 3120279.

United Energy does not dispute the evaluations of MSHA Inspector W. Darios contained in blocks 10.A, 10.B and 10.D of Order No. 3120279.

Despite its statements that it does not dispute the inspector's gravity findings that there was a reasonable likelihood of permanently disabling injuries affecting one to three miners as a result of the cited conditions or practices, the respondent states that it still disputes the inspector's "S&S" determinations associated with each of the violations on the ground that its activities do not constitute "work of preparing the coal" as contemplated by the Act. The respondent also disputes the inspector's determinations that each of the violations resulted from the respondent's unwarrantable failure to comply with the cited standards.

Docket No. WEVA 93-97

In this case the respondent is charged with a violation of MSHA's mandatory training regulation at 30 C.F.R. 48.25(a), after MSHA Inspector Kerry L. George determined that material handler Stanley Dragovich, "a new surface miner employed by the contractor since April 1991", and who was maintaining the beltlines at the mine site, had not been given training. Citing section 104(g)(1) of the Act, the inspector ordered the removal of the cited employee from the mine. The inspector's gravity findings reflect that an injury was "reasonably likely", that the injury could reasonably be expected to be "permanently disabling" and that one (1) person was affected. The inspector concluded that the cited violation was "significant and substantial" (S&S), and that it was the result of "high negligence.

In its answer of January 27, 1993, to the petitioner's proposal for assessment of civil penalty, the respondent admitted that the cited individual did not have MSHA training, and it admitted that the order was issued. However, the respondent specifically stated that it contested the order in its entirety, as well as the findings and determination of the inspector.

In a January 27, 1993, motion to consolidate this docket with Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, the respondent stated that it did not contest the fact that the order in question was issued, but that it did contest jurisdiction as well as the determinations and findings of the inspector.

On March 8, 1993, the respondent filed its responses to certain discovery requests for admissions served by the petitioner. Requested admission No. 8, stated as follows:

> The descriptions of the conditions or practices upon which each of the citation(s) and/or order(s) that are at issue in this case are based, as set forth in each of the citation(s) and/or order(s) under Section 8, "Condition or Practice", and Section 15, "Area or Equipment", are true and accurate.

In its response, the respondent stated as follows:

> United Energy admits that Stanley Dragovich was not given MSHA training. However, United Energy believes that Mr. Dragovich was adequately trained for his job at a power plant employee. Further, because United Energy does not believe that MSHA's assertion of jurisdiction over this facility is proper, it does not believe Mr. Dragovitch needed MSHA training. Further, United Energy states that the facility was built and has been operated in compliance with OSHA requirements. Moreover, United Energy asked for an interagency determination of whether MSHA or OSHA has jurisdiction over this facility in a September 5, 1991, letter from its counsel, Ricklin Brown, to Stanley Elliot. (This letter has previously been provided to the Court an to counsel MSHA). No definitive response has ever been received.

In response to certain requests for admissions concerning the inspector's gravity, "S&S", and "high" negligence findings, the respondent replied "Denied. See response to Request No. 8". The respondent gave the same answer with respect to Admission Request No. 14, requesting the respondent to confirm that the order was the result of an unwarrantable failure. However, I take note of the fact that the order in question was issued as a section 104(g)(1) order rather than a section 104(d) unwarrantable failure order.

In its April 1, 1993, opposition to the petitioner's summary judgment motion, the respondent does not dispute that the cited employee, Stanley Dragovich, a material handler in its employ since April, 1991, was maintaining the belt lines at its operation without receiving the required MSHA training. However, the respondent does dispute the inspector's gravity and negligence findings on the ground that it has consistently maintained that it is not subject to MSHA's jurisdiction, and that the cited employee was adequately trained for his job and has not been injured or suffered any work-related illness. Further, notwithstanding the fact that the order was not issued as a section 104(d) unwarrantable failure order, the respondent

denies any unwarrantable failure violation and maintains that it is insulated from such a finding because of its consistent and good faith jurisdictional arguments.

In a footnote at page two of it summary judgment motion, the petitioner asserts that it served its request for admissions on the respondent within 20 days of the filing of its penalty assessment proposal as provided for in Commission Rule 29 C.F.R. 2700.55(A), but that the respondent did not respond within th 15 days provided for in Rule 57, 29 C.F.R. 2700.57. Under the circumstances, the petitioner asserts that the admissions are admitted and conclusively established. In support of this position, the petitioner relies on the procedural regulations at 29 C.F.R. 18.20(b) and 18.20(e).

The petitioner's reliance on the cited regulations found in 29 C.F.R. 18.20(b) and 18.20(e), are without merit. Those regulations apply to matters before that Department of Labor's Administrative Law Judges and they are not binding on this Commission's Judges. Commission Rule 57, which has since been replaced by Rule 58, 29 C.F.R. 2700.58(b), effective May 3, 1993, did not provide for adoption of proposed admissions where the responses are untimely filed. The present Rule 58(b), authorizes the presiding Judge to order a longer or shorter time for responding to admissions, and any matter that is in fact admitted is conclusively established for the purpose of the pending case unless the Judge, on motion, permits a withdrawal or amendment of the admission. However, since I find no evidence of any prejudice to the petitioner because of the late responses by the respondent, the petitioner's arguments ARE REJECTED, and its

suggestion that its proposed gravity and negligence admissions should be deemed to be conclusively established are likewise REJECTED.

WEVA 92-961

In this case, the respondent was charged with a violation of MSHA's mandatory training regulation at 30 C.F.R. 48.25(a), on February 27, 1992, after MSHA Inspector Phillip Wilt observed three of the respondent's employees the previous day working near moving conveyor belts on Island Creek Coal Company property without first receiving "no less than 24 hours of comprehensive training". The inspector considered the cited employees to be "a hazard to themselves and others", and citing the training requirements of section 115 of the Act, and section 104(g)(1) of the Act, he ordered the withdrawal of the three employees (Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher). The inspector's gravity findings reflect that an injury was "reasonably likely", that the injury could reasonably be expected to be "permanently disabling", and that three (3) persons were affected. The inspector also concluded that the cited violation was

"significant and substantial" (S&S), and that it was the result of "high" negligence.

In its initial answer of August 21, 1992, to the petitioner's civil penalty proposal, the respondent took the position that it was an electric utility subject to OSHA, rather than MSHA, jurisdiction, and stated that "it does not contest the violation".

In its responses of August 21, 1992, to the petitioner's initial interrogatories, the respondent stated it intended to contest MSHA's jurisdiction and did not intend to contest the citation or order. In response to certain questions concerning the special "significant and substantial" (S&S) finding associated with the citation, the respondent answered "N/A". In responding to the petitioner's discovery requests, the respondent made the following general statement that is included in all of its responses in these proceedings:

> By responding to the discovery requests, United Energy does not concede the relevance of any matter at issue in any of the Secretary's Interrogatories, does not agree to the admissibility in evidence of any information or document provided, and expressly reserves all evidentiary objections to the time of hearing in this proceeding.

On September 14, 1992, the respondent filed a motion to consolidate Docket Nos. WEVA 92-916, WEVA 92-961, and WEVA 92-1045, and stated that although it contested MSHA's jurisdiction, it did not contest the violations which gave rise to the proposals for assessment of civil penalties. This statement was repeated again by the respondent when it filed a motion on January 8, 1993, to compel the petitioner to answer its discovery requests and to continue the scheduled hearings.

In its April 1, 1993, opposition to the petitioner's motion for summary judgment, the respondent states that it does not dispute that three of its employees, Craig W. Knotts, Randy Rohrbaugh, and Homer Fletcher, were working near moving belts which were part of its opertation without receiving MSHA training.

The respondent disputes the inspector's gravity findings, and it takes the position that the cited employees have always been adequately trained for their jobs with the respondent and have not suffered any job related accidents or injuries despite working in the cited area for some time before MSHA's inspection. For these same reasons, the respondent also dispute the inspector's "high negligence" finding. In addition to its claim that the employees were trained, the respondent asserts that since it believed in good faith that MSHA lacked jurisdiction

over its operations and that MSHA training was not required, it was not negligent in failing to provide MSHA training for the cited employees.

The respondent also disputes "the Secretary's assertion that the violation cited in Order No. 3120293 issued under section 104(d) of the Mine Act was caused by the unwarrantable failure" of the respondent to comply with the cited standard. The Secretary's assertion is erroneous. The disputed order was not issued pursuant to section 104(d) of the Act, and it is not an "unwarrantable failure order". The order simply served as the statutory mechanism for removing the untrained personnel from the cited mine area, and the petitioner's civil penalty proposal is based on the alleged violation of the training requirements found in the cited mandatory regulation at 30 C.F.R. 48.25(a).

WEVA 92-1045

In this case the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 77.502, for failing to conduct monthly electrical examination of the electrical components of the belt lines at the refuse pile located on mine property. The inspector's gravity finding reflects that an injury was "reasonably likely", that the injury could reasonably be expected to result in "lost workdays or restricted duty", and that one (1) person was affected. The inspector concluded that the violation was "significant and substantial" (S&S), and that it was the result of "high" negligence,"unwarrantable failure" by the respondent.

At page 33 of its Motion for Summary Judgment, the petitioner states as follows:

> As for the question of the validity of the citations and orders and the correct civil penalty to be applied, all facts relating to these questions, except for those arising from Docket No. WEVA 92-1045, were admitted by the respondent. As for the facts arising from Docket No. WEVA 92-1045, the Respondent's Answer acquiesces in the facts underlying the order contained therein, with the motion to consolidate and other documentation reiterating this agreement. No motion to Amend Answer having been filed, no facts have been disputed in Docket No. WEVA 92-1045 other than those regarding jurisdiction.

In its answer of September 10, 1992, the respondent stated that it did not contest the violation. However, it challenged MSHA's jurisdiction, and claimed that it was an electric utility subject to OSHA jurisdiction. In its subsequently filed motions for consolidation and enforcement of its discovery requests, the

respondent again stated that it did not dispute the violation which gave rise to the civil penalty proposal filed by the petitioner.

In its opposition of April 1, 1993, to the petitioner's motion for summary judgment, the respondent stated that it does not dispute that it had not conducted the required MSHA monthly electrical examination of the electrical components of the belt lines at its operation. I take note of the fact that the respondent's statement does not specifically address that portion of the order which states that the cited belt lines "were on mine property and were the responsibility of the contractor".

The respondent disputes the inspector's gravity findings. It also disputes the inspector's "high" negligence and unwarrantable failure finding on the ground that its consistent jurisdictional position and good faith belief that it was not subject to Mine Act jurisdiction insulates it from such findings.

In support of summary judgment in its favor, the petitioner asserts that except for Docket No. WEVA 92-1045, the respondent has admitted to all of the facts relating to the validity of the citations and orders that are in issue in Docket Nos, WEVA 92-916; WEVA 92-961, and WEVA 93-97. With respect to WEVA 92-1045, the petitioner maintains that the respondent's answer and other documentation reflects the respondent's acquiescence in the facts underlying the order, and that the respondent has disputed no facts other than those regarding jurisdiction. The petitioner concludes that there are no genuine

issues of any material facts in any of these cases, except for disputes regarding the application of the law to these facts, and that summary judgement is appropriate.

I agree with the petitioner's position that the respondent has opted not to contest the conditions or practices cited as violations of each of the cited mandatory safety standards. Indeed, it seems clear to me from the pleadings filed in these matters, including the answers and the discovery responses filed by the respondent, as well as its admissions filed as part of its arguments in opposition to the petitioner's summary judgment motion, that the respondent does to deny the existence of the conditions or practices cited by the inspectors as violations.

Apart from the respondent's admissions concerning the cited conditions and practice, I have reviewed and considered the deposition testimony of the inspectors who issued the violations in these proceedings. In Docket No. WEVA 92-916, Inspector Darios testified as to the facts and circumstances that prompted him to issue the four guarding violations (No. 3120276, Tr. 56-57, 72-73, 86-87, 89-91; No. 3120277, Tr. 99-104;

No. 3120278, Tr. 108-109; No. 3120279, Tr. 112-113). The cited mandatory guarding regulations, sections 75.400(a), (c), and (d), require that tail pulleys and similar exposed moving machine parts be guarded, that all guards be securely in place while the machinery is being operated, and that conveyor drive, head, and tail pulley guards extend a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

In Docket No. WEVA 93-97, Inspector George testified that he observed Mr. Dragovich arrive at the gob area in a truck owned by "the power plant", and he determined that Mr. Dragovich came to the gob area to inspect the conveyor belt that was on mine property. Mr. Dragovich informed Mr. George that he worked for the respondent, and when asked about his training, Mr. Dragovich informed Mr. George that he last received training when he worked for Island Creek as an underground miner (Tr. 73-74). Since Mr. George found no evidence that Mr. Dragovich had received any MSHA surface mining training, he issued the order in question (Tr. 83-84).

Supervisory Inspector Ryan, who accompanied Mr. George during his inspection, testified that contractor personnel who work in surface areas of underground mines for any period in excess of five days are required to have MSHA comprehensive training. If such employees had worked underground, they would have to receive 40 hours of comprehensive training, or hazard training (Tr. 35, 86, 89). Mr. Ryan testified that he was with Inspector George when he issued the training violation concerning Mr. Dragovich. Mr. Ryan stated that Inspector George observed Mr. Dragovich at the gob area, and asked him if he had any training. Mr. Dragovich informed Mr. George that he had previously worked for Island Creek and had some training in that job, but had not received any miners' training "since approximately two years ago" (Tr. 107). Island Creek then summoned Mr. Bowman to the area, and he could produce no training records for Mr. Dragovich (Tr. 107).

In Docket No. WEVA 92-1045, Inspector George testified that after conducting an inspection of Island Creek's preparation plant, its heavy equipment, the railroad, and the gob pile, he asked to see the electrical examination records, but that the respondent's representative, Jim Bowman, and Island Creek's representative, Tom Lobb, could not produce them (Tr. 43). Mr. George stated that Mr. Bowman contended that MSHA had no jurisdiction over the respondent, and confirmed that the electrical examinations were not being conducted (Tr. & 51). The cited mandatory regulation section 77.502, requires frequent examination of electric equipment, and record keeping of such examinations.

In Docket No. WEVA 92-961, Inspector Wilt testified that in the course of an inspection at the mine site on February 27, 1992, he issued citation No. 3120293 after determining that three of the respondent's employees working near the conveyor belt on mine property had not received the required MSHA training. Mr. Wilt confirmed that these were the same three employees cited by Inspector Darios the previous day, February 26, for shovelling at the belt tailpiece with the guarding removed (Tr. 33-34). Mr. Wilt stated that he issued the violation after the respondent's representative, Mr. Bowman, could not produce any training records for the employees in question (Tr. 36). Mr. Wilt also considered the fact MSHA training was required for any contractor employee doing work on Island Creek's mine property (Tr. 37).

Inspector George testified that at the time of his May 12, 1992, inspection, he asked Mr. Bowman about the training violation previously issued by Inspector Wilt, and inquired as to whether it had been abated. Mr. Bowman informed him that the respondent's management was of the view that it did not have to provide MSHA training, and that the prior order issued by Mr. Wilt had not been abated. (Tr. 54-55). Mr. George then informed Mr. Bowman that until the cited personnel were trained they could not work in the area, and Mr. Bowman made no comment other than to indicate that "he was not complying because there was a dispute over jurisdiction" (Tr. 56).

In view of the foregoing, I conclude and find that the evidence and testimony of record in these proceedings establishes that the cited conditions or practices as described by the inspectors on the face of the citation and orders in question constitute violations of the cited MSHA mandatory safety and training regulations. Accordingly, the violations ARE AFFIRMED.

With respect to the "significant and substantial" (S&S), and "unwarrantable failure" issues presented in these cases, I reject the petitioner's suggestions that the respondent has capitulated on all of these issues and that its admissions with respect to the citation and orders should be adopted as absolute proof that all of the violations were significant and substantial and resulted from an unwarrantable failure on the part of the respondent to comply with the cited mandatory standards. Having carefully reviewed all of the pleadings filed in these proceedings, I cannot conclude that the respondent intended to waive its right to litigate the special findings made by the inspectors with respect to the violations.

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The Unwarrantable Failure Issues

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

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

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

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

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

> We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention."

> Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. * * *

Docket Nos. WEVA 92-961 and WEVA 93-97

As noted earlier, the orders issued in these cases are not unwarrantable failure orders pursuant to section 104(d) of the Act, and the arguments advanced by the parties on this issue are irrelevant and inapplicable.

Docket No. WEVA 92-916

Inspector Darios testified by deposition that in the course of his inspection on February 26, 1992, he spoke with fellow inspector Phillip Wilt who informed him that he had issued citations and orders for miners shoveling around the belt in different areas with the guards removed during prior inspections. Mr. Darios confirmed that the prior citations and orders were issued to Island Creek Coal Company and that Mr. Wilt had spoken to Island Creek's management about the matter (Tr. 73). Mr. Darios also confirmed that no representative of the respondent accompanied him during his inspection on February 26, and that the events of that day were "really vague" (Tr. 84-85).

Mr. Darios confirmed that he observed the three cited employees (3120276) simply drive up and begin shoveling after removing the side belt guard, and that this activity lasted approximately five minutes (Tr. 89). He concluded that this was a "common practice" because of "the way that it was performed" and the number of citations and orders previously issued by Mr. Wilt (Tr. 92). He explained his "high negligence" and unwarrantable failure findings as follows at (Tr. 93-96):

> A. When management is aware -- been made aware of hazardous conditions, they are to take action to correct, prevent, or eliminate those hazardous conditions or practices from their mining operation. From the apparent attitude, just perceived, of these miners just driving up and pulling off a guard and shoveling, it was like there was nothing wrong with it. That was part of management's accepted practice.
>
> * * * * * * * *
>
> A. Where serious hazards are involved, and it becomes, in my opinion, blatant disregard for the safety and health of miners, then there is a high degree of negligence. That is strictly my opinion.

Mr. Darios did not know whether or not the respondent in these proceedings had been previously cited by Inspector Wilt. Mr. Darios stated that it was his understanding that the management of the Wiley Construction Company and the respondent's management had changed in name only, but he could not recall who informed him of this (Tr. 94). He confirmed that a meeting was held with Island Creek's management when the citation was abated, and that the citation was subsequently changed to reflect that it was served on the respondent rather than Island Creek. Mr. Darios also commented that the contractor management system was "a mess" and that "I can't understand the whole framework of this management system (Tr. 97).

With regard to the cited unguarded grizzly tail pulley order (3120277), Mr. Darios stated that he based his order on the fact that Mr. Wilt had earlier informed him that people were removing guards and shovelling the belts and that "it was becoming more and more evident at that time that people were not having any regard to guarding belts on this particular belt line, or areas of the pulleys or drives" (Tr. 100). Mr. Darios did not know whether or not any management representative of the respondent was present after he issued his initial citation and continued his inspection (Tr. 100). Mr. Darios also confirmed that no one was working in the immediate cited area, and he could nor recall observing anyone working in that area earlier in the day (Tr. 102).

Mr. Darios stated that he based his section 104(d)(1) order on the previously issued section 104(d)(1) citation and his belief that routine daily safety checks of the belt equipment were not being made so that conditions such as those he observed could be discovered and corrected (Tr. 105). When asked to explain the meaning of "the unwarrantable series", Mr. Darios responded "Knew, or should-have-known of conditions by the operator" (Tr. 106). Mr. Darios confirmed that "management" assigned someone to replace the guards in order to abate the order, but he could not recall whether an Island Creek employee or an employee of the respondent replaced the guards (Tr. 107).

With regard to the order citing the unguarded grizzly feeder chain drive sprockets (3120278), Mr. Darios stated that he did not clearly remember the conditions, but after referring to his notes, he confirmed that the guard was laying on the ground beside the chain drive area (Tr. 108). He based his "high negligence" finding on "repeated findings of guards being removed or missing, and not in position", and he stated that "this refers back to the 104(d)(1) citation" (Tr. 110).

With regard to the order citing a conveyor belt pulley that was not sufficiently extended to prevent contact with persons (31202279), Mr. Darios stated that "based on the number of violations that I had already issued previously on guarding that

day, I was almost to the point of frustration and ridiculousness, as far as I was concerned, to the extent that the guarding was being let go. And I felt that it was very unwarrantable on management's part to permit that" (Tr. 113).

Inspector Edwin Fetty's deposition testimony reflects that he began an electrical inspection at Island Creek's mine site in August, 1991. Mr. Fetty stated that on August 5, 1991, he was at the mine with Inspector Wilt and they met with Jim Lemons, Island Creek's maintenance and electrical supervisor, and that Mr. Wilt and Mr. Lemons accompanied him during his inspection on that day (Tr. 13). Mr. Fetty stated that he issued a belt citation (3316749) that day to Island Creek, but that someone mentioned that Wiley Construction was the responsible party (Tr. 17-19). Mr. Fetty stated that the citation was issued for failing to replace a belt drive unit guard that had been removed (Tr. 23).

Supervisory Inspector Barry Ryan testified by deposition that Island Creek Coal Company had received unwarrantable failure citations prior to Inspector Wilt's encounter with contractors at Island Creek's gob pile on July 30, 1991 (Tr. 49, 52). Mr. Ryan alluded to a conference held by Mr. Wilt with Island Creek concerning MSHA's Repeat Violation Reduction Program (RVRP) (Tr. 52). Mr. Ryan stated that he and Mr. Wilt met with Island Creek Coal personnel and "some contract people from Wiley Construction" at the refuse pile on July 30, 1991, and he confirmed that they discussed MSHA's jurisdiction of the conveyor belt line and an imminent danger order that Mr. Wilt had issued (Tr. 57-60). Mr. Ryan stated that he was informed that Wiley Construction operated the belt line at that time (Tr. 63).

Mr. Ryan stated that he and Mr. Wilt returned to the site on August 5, 1991, for additional inspections, and Inspector Fetty was also there for an electrical inspection (Tr. 77). Mr. Ryan confirmed that Mr. Wilt issued several citations to Island Creek Coal Company, and that several citations were subsequently modified to show Wiley Construction as the responsible party (Tr. 80). Mr. Ryan confirmed that discussions were held on August 5, 1991, with Wiley Construction's maintenance foreman concerning the guarding violations issued by Inspector Wilt (Tr. 83-84). Mr. Ryan stated that Island creek repeatedly maintained that Wiley Construction was responsible for maintaining the conveyor belts, and that he observed Island Creek and Wiley Construction personnel working together trying to locate a belt guard that had been removed (Tr. 90).

Inspector Wilt testified that he initially inspected Island Creek's North Branch mining operations on July 30, 1991, and issued an imminent danger order and citation to Island Creek after observing a bulldozer operating too close to a backhoe while pushing material on the gob pile. Mr. Wilt observed "a contractor's employee" working in the area where the backhoe was

loading material, but he didn't know the identity of the contractor. He could not recall any hazards associated with the work being performed by the contractor employee, and he issued no violations to the contractor that day. He also observed some missing conveyor drive and rotor guards but did nothing about that on July 30 (Tr. 5-12).

Mr. Wilt stated that he continued his inspection on August 5, 1991, and issued two citations to Island Creek Coal company for lack of audible backup alarms on a front-end loader and a refuse truck (Tr. 13-15). He also issued a citation to Island Creek after determining that the backhoe operator Dale Miller, an Island Creek employee, had not received the 24-hour surface mining training after being transferred from his underground job (Tr. 15-17). He issued seven additional citations to Island Creek, but they were subsequently modified to show the Wiley Construction Company as the responsible party after he determined that Wiley Construction had a contractor ID number on file in the MSHA Morgantown office (Tr. 17, 20). Mr. Wilt alluded to several missing conveyor guards, but he provided no further details concerning these citations, and his testimony is devoid of any further information concerning these prior citations, and copies of these violations were not provided as part of the record in these proceedings.

Respondent's plant manager Robert Seavy testified by deposition that Wylie Construction Company was hired by Energy America, the plant developers, to design and install the plant conveyor belt system which is the same system now maintained and serviced by the respondent United Energy Services, Inc. However, Mr. Seavy stated that there have been no relationships in the past two years between Wylie Services and the respondent, and he did not know who owned Wylie Construction (Tr. 15-16). He was not aware of any Wylie Construction Directors serving as

Directors of the respondent's company, and he indicated that only one or two of the respondent's employees previously worked for Wylie Construction (Tr. 17-18).

Respondent's material handling supervisor James Bowman testified by deposition that he was hired by the respondent on September 15, 1990, and that the Wylie Construction Company was already on-site constructing the conveyor system. He was responsible for overseeing the construction work at that time (Tr. 12). He confirmed that the respondent's employees are responsible for repairs and maintenance of the completed belt conveyor system, including "any repairs that need to be done - - - like the structure, the greasing of the rollers" (Tr. 62). He also confirmed that the respondent's employees are responsible for cleaning all main conveyor belt spills "from the refuse area down to the truck dump" as well as spills on the gob movable one conveyor belt (Tr. 64).

Mr. Bowman testified that he was overseeing the belt construction work when Wylie Construction was cited by MSHA in July an August, 1991, and he was aware that the inspectors issued the violations and that Wylie Construction was working on the belt that time (Tr. 101-102).

After careful review and consideration of all of the aforementioned evidence and testimony of record in these proceedings, I conclude and find that it does not support the unwarrantable failure findings made by the inspector. The inspector's belief that an unwarrantable failure finding may be supported by a "Knew, or should-have-known" standard falls far short of the "aggravated conduct" standard enunciated by the Commission in its controlling decisions. Further, I find no credible, reliable, or probative evidence to support the inspector's unsupported opinions and conclusions that the respondent United Energy Services, Inc., intentionally engaged in or condoned a common practice of removing belt guards while the equipment was in operation. On the contrary, it would appear to me that any such practice was carried out by Island Creek Coal Company and Wylie Construction Company. In the absence of any evidence that Wylie Construction and United Energy Services had common ownership or management, I cannot conclude that the respondent here should be held accountable for any aggravated conduct by another contractor or mine operator who are themselves subject to the Act and to MSHA's enforcement jurisdiction. Under all of these circumstances, the section 104(d) (1) citation and section 104(d)(2) orders issued by Inspector Darios ARE VACATED, and they all modified to section 104(a) citations.

WEVA 92-1045

With respect to Inspector George's unwarrantable failure finding in connection with the respondent's failure to conduct the required electrical inspections of the belt conveyor components that were on mine property, Mr. George stated that during every prior mine inspection that he conducted in early 1991 or 1992, he was accompanied by Island Creek personnel. He confirmed that he did not contact any representative of the respondent before starting his May 12, 1992, inspection. However, he did speak with respondent's representative, Jim Bowman, and Island Creek's representative, Tom Lobb, and they could not produce any records of any electrical examinations for his review (Tr. 42-43). Mr. George stated that he informed Mr. Bowman that Inspector Fetty had previously cited the same violation and that Island Creek had taken the position that the contractor was responsible for the belt line. Mr. Bowman informed Mr. George of his opinion that the respondent's operations were not under the jurisdiction of MSHA (Tr. 44). Mr. George confirmed that the violation was abated after Island Creek's certified electrician performed the required electrical examination.

Mr. George stated that Mr. Bowman indicated to him that he did not believe that MSHA should be inspecting the respondent's operation, and that he informed Mr. Bowman that he did have the authority to inspect the operation on mine property and issued the violation to the respondent and to Island Creek (Tr. 45). He confirmed that Mr. Bowman told him that the electrical inspections were not being conducted, and Mr. George proceeded to issue the order. It was terminated within a half-hour after an Island Creek Coal Company certified electrician conducted an electrical examination (Tr. 52). Mr. George "conferenced" the order with Mr. Bowman and discussed the fact that other citations and orders had been issued for the lack of electrical inspections (Tr. 54).

Mr. George made reference to a previously issued section 104(d)(2) Order No. 3720849 issued to Island Creek Coal Company for not conducting electrical examinations on certain trailers and portable generators (Tr. 49-50). Mr. George's inspection notes reflect that power was established to that equipment on May 7, 1992, and that the order was issued as a "non-"S&S" order. However, the order is not a matter of record in this case. I take note of the fact that Mr. George's order of May 12, 1992, cites the previously issued guarding Order No. 3120277, issued on February 26, 1992, by Inspector Darios, as the underpinning for his May 12 order.

Mr. George stated that the failure to conduct the required electrical examinations was previously brought to the attention of the respondent's personnel and he believed that "it was a condition that was continuing" (Tr. 60). Under the circumstances, Mr. George concluded that the violation was the result of "high" negligence by the respondent and warranted a section 104(d) order (Tr. 61).

I have reviewed the deposition testimony of MSHA electrical inspector Edwin Fetty, and apart from the previous guarding citation that he issued on August 5, 1991, I find no testimony regarding any prior citations or orders that he may have issued regarding the failure to conduct electrical examinations, and the petitioner has not submitted any evidence of any such prior violations being served on the respondent in these proceedings.

After careful review of all of the evidence and deposition testimony in these proceedings, I cannot conclude that it supports the inspector's unwarrantable failure finding. In short, I cannot conclude that the petitioner has proved that the violation in question was the result of any "aggravated conduct" on the part of the respondent in this case. Under the circumstances, the section 104(d)(2) order issued by Inspector George IS VACATED, and it is MODIFIED to a section 104(a) citation.

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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).

With regard to guarding Violation No. 3120276, concerning the three cited employees shoveling at the No. 2 gob conveyor belt tailpiece with the guarding removed, Inspector Darios believed that if the unguarded pulley were to contact a shovel it would "cause the shovel to slop and strike somebody. It is a tight position, it can cause you to be drug under the belt by holding onto the shovel handle. If they slip, it could drag them into the belt and permanently diable, crush, or kill them" (Tr. 91). In response to a question as to why he believed that an injury was "reasonably likely". Mr. Darios responded as follows at (Tr. 91):

> A. If the condition permitted to continue, and if people are permitted to continue to shovel the belts without guards, the probability increases that somebody is going to get caught into, slip into, or caught by, based upon history and nature of mining.

In response to a question as to why he found that an injury could reasonable be expected to be permanently disabling. Mr. Darios stated as follows at (Tr. 92):

> A. Again, that is where the person who gets caught in it is not going to be able to get himself out. If the shovel handle flips back and hits him in the eye or some particular part of the body, it can dismember him. It can poke his eye out. I he gets caught in it, it could take his hand, his arm, or his entire body into it.

In response to a question asking him to explain the basis for his "S&S" determination with respect to the violation, Mr. Darios stated as follows at (Tr. 93):

> A. Any time that a condition exposes a miner to a degree of hazard that would possibly cause him permanently disabling injury, and is reasonably likely to occur then it would be significant and substantially hazardous to him.
>
> Q. That is based upon your previous training, experience, and your knowledge of the MSHA requirements?
>
> A. Based on my experience in mining, period, ma'am.

I agree with the inspector's "S&S" finding with respect to the three employees shovelling at the gob conveyor tailpiece with the guarding removed. The inspectors's notes, which are a part of the record in this case, includes a sketch which places the

three employees inclose proximity to the unguarded tailpiece, and they corroborate his testimony that the three employees simply drove up the belt, removed the guard, and started shovelling while the belt was running. Given the fact that there were three people in what appears to be a relatively small area, I believe it would be reasonably likely that in the course of shovelling, and while attempting to stay out of each other's way, or through inattention, one or more of the shovels would contact the exposed piece of equipment in question. If this were to occur, I believe that it would be reasonably likely to result in an injury. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

With regard to the unguarded grizzly belt tail pulley, violation No. 3120277, Mr. Darios testified that his notes reflected that there was a ten-inch opening, 30 inches long, at the rear and one side of the grizzly that was not guarded. He described the area as "a tight area where a person can slip and get their feet in, or if they are cleaning, he caught in with a shovel. It is just a tight area where you can really get pinched or caught" (Tr. 101). He confirmed that he observed no one shovelling with the belt running, and he observed no one in the cited area when he observed the condition. However, he did observe someone cleaning, but could not recall whether it was earlier or later during the work shift (Tr. 102). Mr. Darios explained his gravity and "S&S" findings as follows at (Tr. 104-105):

> A. Based upon what I had seen previously on this shift, people just removing guards and shovelling, I would presume that people would walk in there and start shoveling just like they would in any other belt pulley or drive in the mine.
>
> Q. So that is why you made the reasonably likely designation for illness or injury?
>
> A. Yes ma'am.
>
> Q. Is that also why you made designation B, that permanently disabling injury or illness was reasonably expected?
>
> A. Similar condition, similar expectancy of occurrence.
>
> Q. Tell me why you said that this was a significant and substantial situation?
>
> A. The same. Based on the degree and nature of the injury that occur.

Q. You indicate under block 10-B that the number of person affected is one, but your notes indicate that no one was shoveling in this area at the time. How did you arrive at the indication for 10-B.

A. One would be - without having anybody exposed, you would normally suppose that one person would be assigned to work kin this area because it is tight.

For the reasons stated in my affirmance of the inspector's "S&S" finding with respect to citation No. 3120276, I conclude and find that the inspector's "S&S" finding with respect to Order No. 3120277, was warranted, and it IS AFFIRMED.

With regard to the unguarded feeder chain drive sprockets and chain, Violation No. 3120278, Mr. Darios stated that if anyone working in the area were to slip or fall, the unguarded sprocket "will drag them in a hurry, and they can't get away from it" (Tr. 108). He stated that a bulldozer operator and a backhoe operator were "in close proximity" to the area earlier, but they were not in the "immediate area" (Tr. 108). He believed that the cited condition posed a hazard to these two individuals, as well as "anybody that would be working in that area to clean the belt or to do work around the belt" (Tr. 109). His inspection notes reflect that the cited area had bottom irregularities, "a close fit in tight area, approximately 2 feet wide by guard", and Mr. Darios noted his concern over other employees simply driving up and removing guards in order to cleanup while the belt was running as was the case with the first violation that he issued.

Although I am not totally convinced that the bulldozer operator or backhoe operator were close enough to the unguarded feeder sprocket to pose a hazard to them, Mr. Darios believed that they were used on several occasions to clean up around that area. Further, Mr. Bowman testified that the respondent's employees are responsible for cleaning and maintaining the belt in question, and it would appear that one or more of these employees would be in the area. Given the bottom irregularities in the area, and the rather confirmed work area adjacent to the unguarded sprocket, I believe that it would be reasonably likely that someone could contact the exposed and unguarded sprockets and chain with a shovel, or with his hand or other body part if he were to slip. If this were to occur, I further believe that it would be reasonably likely that serious injuries would result. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

With regard to Violation No. 3120279, for an inadequately guarded gob belt take-up pulley, Mr. Darios explained his gravity findings as follows at (Tr. 113, 117-118):

A. The exposure of the pulley, again, without sufficient length guarding, and based on the number of violations that I had already issued previously on guarding that day, it was almost to the point of frustration and ridiculousness, as far as I was concerned, to the extent that the guarding was being let go. And I felt that it was very unwarrantable on management's part to permit that.

Q. Would your testimony be the same regarding the gravity designations that you made as the explanations that you have given earlier?

A. Yes, ma'am.

I cannot conclude that the evidence in this instance supports the inspector's "S&S" finding. I have reviewed the inspector's notes with respect to this violation, and I take note of a notation by the inspector that the unguarded pinch point that concerned him was six-and-one feet above ground level. In the absence of further evidence, I cannot conclude that it was reasonably likely that anyone could have contacted the exposed area that concerned the inspector. Further, the explanation offered by the inspector in support of his gravity finding speaks more to the respondent's negligence rather gravity. Under the circumstances, the inspector's "S&S" finding IS VACATED, and the violation IS MODIFIED to a non-"S&S" violation.

WEVA 92-961

Inspector Wilt's deposition is devoid of any relevant testimony concerning his special "S&S" finding associated with the three untrained employees who were cited on February 27, 1992. Although Inspector George alluded to the violation, he simply indicated that three individuals whose names he could not remember, and who he identified as "maintenance personnel for the belt line", were not provided with training (Tr. 55). Under the circumstances, I conclude and find that the evidence presented it this case does not establish that the violation in question was "S&S", and the inspector's finding is this regard IS VACATED. The violation IS MODIFIED to a non-"S&S" violation.

WEVA 92-1045

Inspector George believed that the failure to conduct the electrical examinations was an "S&S" violation and would reasonably likely result in an injury because "any fault could be there without their realizing it, and an injury could occur" (Tr. 58). He confirmed that no one was working in the areas where the electrical belt components were located, and he did not know whether any examinations had been conducted pursuant to any

OSHA regulations. He further confirmed that he found no problems with any of the electrical belt components, and he conceded that he observed no conditions that would result in a fatality or permanently disabling injury. However, he believed "that there could be a shock or a burn injury", and that one individual would normally be working in the cited area. He identified that individual as "cleanup, maintenance, or whatever" (Tr. 59-60).

I cannot conclude that the inspector's "S&S" finding is supportable. Although I have found that a violation occurred, and would agree that it is possible that anyone contacting a faulty piece of electrical equipment could suffer injuries, there is no credible or probative evidence to support any reasonable conclusion that it was reasonably likely that someone would be injured as a result of the violation in this case. None of the electrical components are identified or explained, and there is no evidence that any of the cleanup or maintenance personnel would be in close proximity to any of the components that may not have been examined. Further, Mr. George found nothing wrong with those components, and although he mentioned shock and burn injuries, I find no evidence to support the reasonable likelihood of such injuries. Under all of these circumstances, the inspector's "S&S" finding IS VACATED, and the violations IS MODIFIED to a non-"S&S" violation.

WEVA 93-97

Inspector George testified that after finishing his inspection of the Island Creek preparation plant on August 27, 1992, he went to the gob area and observed Mr. Dragovich "working in that area". Mr. George stated that Mr. Dragovich had come to the area in a truck owned by "the power plant" to inspect the beltline at the gob area. Mr. Dragovich informed Mr. George that he worked for the respondent, and when asked about his training, Mr. Dragovich informed Mr. George that he last received training when he worked for Island Creek as an underground miner (Tr. 73-74).

Mr. George concluded that Mr. Dragovich's lack of surface training could reasonably likely result in an injury because "the man had not received any type of surface training. He could run into a situation that he was not familiar with, and an accident could occur" (Tr. 80). Mr. George confirmed that he made a gravity finding of "lost work days or restricted duty", and he observed nothing that would lead him to conclude that Mr. Dragovich's lack of surface training would result in a fatality or permanently dialing injury. He also stated that Mr. Dragovich's lack of knowledge of surface situations could result in a "minor accident", and he based this opinion on the fact that he found no other violations at the dozer hopper or belt area where he observed Mr. Dragovich. Mr. George confirmed that he was aware of the fact that Mr. Dragovich had previous

underground mining experience, and had worked for the respondent since April 1991, with no problems, injuries, or accidents (Tr. 81-84).

I cannot conclude that the evidence of record supports any conclusion that Mr. Dragovich's lack of MSHA training constituted a significant and substantial violation. I find no credible or probative facts to support any conclusion that the lack of training would reasonably likely result in injuries to Mr. Dragovich or others. At the time that the inspector observed Mr. Dragovich he had apparently drive by the conveyor in a truck visually observing the beltline and that he got out of his truck when he reached the gob pile area. Given the fact that Mr. Dragovich had worked for the respondent in surface areas for over a year, had previous mining experience, and had never encountered any safety difficulties on the job, I cannot conclude that his lack of MSHA training would place him or others at risk. Under the circumstances, the inspector's "S&S" finding IS VACATED, and the violation IS MODIFIED to a non-"S&S" violation.

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

The petitioner asserts that during the last few months of 1992, and after the citation and orders in these cases were issued, the North Branch refuse area was split from the North Branch Mine I.D. renamed North Branch Fuel Supply, and given I.D. No. 46-08253. However, it is still operated by the Laurel Run Mining Company.

The petitioner states that the underground portion of the North Branch Mine has merged into Potomac Mine, I.D. No. 46-04190, a mine that it connects with underground, and that North Branch Mine is now called the North Portal of Potomac Mine, is under the I.D. number of Potomac Mine, and is still operated by Laurel Run. Further, the petitioner states that the surface area of the North Branch Mine and the North Branch Preparation Plant have remained under the I.D. number of the North Branch Mine, I.D. No. 46-04190, and are being shut down, with the coal and refuse from the North Portal of Potomac Mine being sent elsewhere, and that Island Creek Coal Company is the operator for I.D. No. 46-04190 while the operations are being closed down. The petitioner concludes that these differences have no effect on the issues in these proceedings since the citation and orders were issued while active operations were taking place at the North Branch Mine, North Branch Preparation Plant, an the North Branch Refuse area.

The petitioner states that the respondent has 65 employees at the plant site and that its operations require approximately 135,200 annual work hours. Petitioner concludes that this constitutes a medium-sized operation. I agree.

The petitioner takes the position that payment of the proposed civil penalty assessments of $2,900, for all of the violations in these proceedings will not adversely affect the respondent's ability to continue in business. Although the respondent has conceded as part of its admissions in these cases that payment of the proposed penalties will not adversely affect its ability to continue in business, it takes the position that being subject to MSHA's enforcement jurisdiction could impact on its ability to continue in business.

In a contested civil penalty case the presiding judge is not bound by the penalty assessment regulations and practices followed by MSHA's Office of Assessments in arriving at initial proposed penalty assessments. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto. Shamrock Coal Co., 1 FMSHRC 469 (June 1979); aff'd, 652 F.2d 59 (6th Cir.1981); Sellersburg Stone Company; 5 FMSHRC 287, 292 (March 1983). As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir., 1984).

It seems obvious to me that the respondent would rather be regulated by OHSA rather than MSHA. However, the fact that an operator must spend money to bring its operations into compliance with MSHA's safety and health standards, and fails to budget money for paying penalties is no basis for not imposing civil penalty assessments for proven violations. See: J & C Coal Corporation, 8 FMSHRC 799 (May 1986); Town of Canandaigua, 2 FMSHRC 2154 (August 1980). The respondent's suggestion that subjecting it to MSHA's enforcement jurisdiction may adversely affect its ability to continue in business IS REJECTED. This argument could be raised by any mine operator or contractor who is not too enchanted with being regulated by MSHA, and who would prefer to be regulated by OSHA, as "the lesser of two evils". The respondent is free to present evidence that payment of any particular proposed civil penalty assessment may adversely affect its business. However, in the instant proceedings, I cannot conclude that the payment of the penalties that I have assessed for the violations in question will adversely affect the respondent's ability to continue in business.

History of Previous Violations

The petitioner has confirmed that the respondent has no history of previous violations. I adopt this as my finding and conclusion on this issue.

Good Faith Abatement

The petitioner asserts that the violations were abated in good faith within the times set for abatement. The abatement information reflects that the grizzly gob feeder chain guard was replaced in two hours (Order No. 3120278); the rear tailpiece pulley guard was replaced and a new side guard was installed in two hours (Order No. 3120277); the conveyor belt take-up pulley was expanded a distance sufficient enough to prevent contact by and/or injury to persons within 1 1/2 hours (Order No. 3120279); and that the electrical inspection was completed and recorded by a certified person within 35 minutes.

Gravity

Based on my "S&S" findings and conclusions with respect to the violations in these proceedings, I conclude and find that the guarding violations 3120276, 3120277, and 31202778, issued by Inspector Darios were serious violations. I further conclude and find that all of the remaining violations were non-serious.

Negligence

Although I have no reason not to believe the respondent's assertions that it had a good faith belief that it was not subject to MSHA's enforcement jurisdiction, based on all of the evidence and testimony of record in these proceedings, I am not convinced that the respondent was totally oblivious to the fact that MSHA was asserting jurisdiction in those mine areas where contractor work was being performed.

The testimony of the inspectors reflects that Mr. Bowman was informed prior to the issuance of the violations in these proceedings that any contractor performing work on mine property was subject to MSHA's regulatory and enforcement jurisdiction and would be held accountable for any violations by contractor employees while working on mine property. Mr. Bowman stated that the was "overseeing" some of the conveyor construction work as early as September 1990 (Tr. 94). He also stated that prior to working for the respondent, he worked for a coal company for ten years, including a job as plant manager. He also worked for eight years building and operating coal preparation plants (Tr. 9-12). He confirmed that the was aware of the differences between the OSHA and MSHA conveyor and guarding standards (Tr. 95). He also confirmed that in July and August, 1991, he was aware of the fact that MSHA was asserting jurisdiction over the conveyor belt on North Branch property, and that he was aware that Wylie Construction had been cited with violations by MSHA for violations incident to that conveyor (Tr. 100-104).

Although Mr. Seavey indicated that he had no knowledge of MSHA when he was first hired at the plant on October 1, 1991, he

stated that "I knew of the interface at the refuse pile, where we accepted the refuse from Island Creek Coal (Tr. 44).

In view of the foregoing, I conclude and find that all of the violations in these proceedings were the result of the respondent's failure to exercise reasonable care to prevent the violative conditions which it knew or should have known existed at the time they were observed by the inspectors, and that this amounts to ordinary or moderate negligence.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
3120276	2/26/92	77.400(d)	$200
3120277	2/26/92	77.400(a)	$95
3120278	2/26/92	77.400(d)	$95
3120279	2/26/92	77.400(c)	$75
3120293	2/27/92	48.24(a)	$60
3720850	5/12/92	77.502	$80
3115366	8/27/92	48.25(a)	$75

ORDER

The respondent IS ORDERED to pay the civil penalty assessments enumerated above within thirty (30) days of the date of these decisions and order. Payment is to be made to the petitioner (MSHA), and upon receipt of payment, these proceedings are dismissed.

George A. Koutras

Administrative Law Judge

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Distribution:

Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Boulevard, Rm. 516,
Arlington, VA 22203 (Certified Mail)

Monica K. Schwartz, Esq., Bowles, Rice, McDavid, Graff & Love,
16th Floor Commerce Square, Lee Street, P.O. Box 1386,
Charleston, WV 25325-1386 (Certified Mail)

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