

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 20, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. KENT 2013-413
	:	A.C. No. 15-18639-311429
	:	
v.	:	Docket No. KENT 2013-378
	:	A.C. No. 15-18639-308629
SCH TERMINAL COMPANY, Inc., Respondent.	:	Mine: Calvert City Terminal, LLC
	:	
SCH TERMINAL COMPANY, Inc., Contestant,	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. KENT 2013-37-R
	:	Citation No. 7657713; 09/18/2012
	:	
v.	:	Docket No. KENT 2013-38-R
	:	Citation No. 7657714; 09/18/2012
	:	
	:	Docket No. KENT 2013-39-R
	:	Citation No. 7657715; 09/18/2012
	:	
	:	Docket No. KENT 2013-40-R
	:	Citation No. 7657716; 09/18/2012
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Mine: Calvert City Terminal, LLC. Mine ID: 15-18639

**ORDER GRANTING PETITIONER’S MOTION FOR PARTIAL SUMMARY
DECISION**

I. INTRODUCTION

These cases are before me on Notices of Contest filed by SCH Terminal Company, Inc. (“SCH”), and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against SCH, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. These cases stem from a fatal accident involving an employee preparing a barge to be loaded with coal. On August 12, 2013, Petitioner filed a motion for partial summary decision. On September 10, 2013, Respondent filed a brief in opposition.

II. SUMMARY JUDGMENT STANDARD

Commission Procedural Rule 67 sets forth the following grounds for granting summary decision:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). “Material facts” are those that “might affect the outcome of the case under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Pursuant to Commission Procedural Rule 67, “Material facts identified as not in issue by the moving party shall be admitted for the purposes of the motion unless controverted by the statement in opposition.” 29 C.F.R. § 2700.67(d).

In this case, the parties have each set forth facts supporting their position regarding the jurisdiction, and there is little dispute as to those facts. While the parties dispute the proper Commission interpretation of these facts, the arguments set forth involve questions of law. Therefore, the jurisdictional issue at hand can properly be decided based on the record before me. For the reasons that follow, the Secretary’s motion is **GRANTED**.

III. FACTS

The Calvert City Terminal is a coal-handling facility located on the Tennessee River in Calvert City, Marshall County, Kentucky. Respondent’s Br., 2.¹ The Terminal consists of both a land and a river portion of the facility. Sec’y Br., 4.² Miners at the Terminal work in both the land-based portion and in and around the fixed-dock at the river-based portion. *Id.* A miner may work at both locations during one shift. *Id.* The parties stipulate that MSHA has jurisdiction over the land portion of the terminal, but there is dispute as to whether MSHA has jurisdiction over the river portion. *Id.* at 5.

The Terminal receives shipments of coal from producers by barge, rail, and truck. *Id.* at 2. Once the coal is received, it is unloaded and stored at the Terminal. *Id.* Customers place orders for the amount and desired blend of coal. *Id.* The Terminal uses a series of hoppers, belts, and conveyors to blend coal to the customer’s specifications on the land portion of the Terminal. *Id.*; Respondent’s Br., 3. Once blended, the coal is sent onto a series of belts and loaded into rail cars, coal trucks, or barges that are owned by customers or independent

¹ For purposes of this order, the Respondent’s Brief in Opposition to Summary Decision will be cited in the following manner “Respondent’s Br. ____”

² For purposes of this order, the Petitioner’s Br. in Support of Summary Decision will be cited in the following manner “Sec’y Br. ____”

contractors. Sec’y Br., 2.

The loading of coal onto a barge follows a specific process. Miners must “stage,” “draft,” and “pump” the barges, and then tie them to the winch system in order to be loaded. *Id.* at 3. During the “staging” process, a barge is moved into place behind the barge being loaded. *Id.* “Drafting” can occur during the staging process, or after it has been tied to the winch system. *Id.* A miner “drafts” a barge by walking out onto the “gunwhale,” or platform surrounding the barge’s hold. *Id.* The miner then places a long measuring stick, called a “drafting stick,” down into the four corners of the hold. *Id.* The drafting stick measurements are relayed to the loadout-operator in charge of the chute, which comes down over the barge and physically loads the coal. *Id.* The loadout-operator then inputs the draft measurements into a computer program. *Id.* The program informs the loadout-operator the amount of coal that can be loaded onto each barge. *Id.* Miners must “pump” a barge prior to loading it with coal if the barge is carrying water. *Id.*

Once the barge is drafted and pumped, it is tied to the winch system and pulled down alongside of the barge loadout at a steady speed so that it may be loaded evenly. *Id.* Barges are moved into place by tugboats owned by Wepfer, an independent contractor. Respondent’s Br., 3. After one barge has been loaded and released, the next barge in line is hooked into the winch system and loaded. Sec’y Br., 3. While the other barges are waiting in line to be loaded, they are tied together and “staged,” “drafted,” and “pumped.” *Id.*

Respondent contends that the moveable barges are Coast Guard-regulated since they operate on the Tennessee River, which is a Coast Guard-regulated waterway. Respondent’s Br., 4. Conversely, the Secretary argues that the river loadout has never been inspected by, nor has the Terminal submitted training plans to, the Coast Guard, OSHA, or any other regulatory agency. Sec’y Br., 4. Rather, the Terminal only submits training plans to MSHA. *Id.* As such, MSHA maintains jurisdiction over the barges from the time they are staged, drafted, pumped, and otherwise handled by miners for the purpose of being loaded or unloaded until the loading or unloading is complete, the barge is untied from the winch system, and sent down river. *Id.* at 5.

IV. STATEMENT OF LAW

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each “coal or other mine” is subject to the provisions of the Act. “Coal or other mine” is defined under § 3(h)(1) of the Act to mean:

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

30 U.S.C. § 802(h)(1).

Section 3(i) defines “work of preparing the coal” as “[the] breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.” 30 U.S.C. § 802(i). Importantly, Congress intended MSHA to have a wide range of jurisdiction. The relevant Senate report provides, in pertinent part, that:

[T]here may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act *be given the broadest possible interpretation*, and it is the intent of this Committee that *doubts be resolved in favor of inclusion of a facility within the coverage of the Act*.

S.Rep. No. 95-181, 95th Cong., 1st Sess. 1, reprinted in [1977] U.S.Code Cong. & Ad.News 3401, 3414. (emphasis added)

Courts have consistently held that the “mixing or blending” of coal, when done to meet customer or market specifications, constitutes the “work of preparing the coal.” *Kinder Morgan*, 23 FMSHRC 1288, 1294 (Dec. 14, 2001) (Commissioners Jordan and Beatty), *aff'd*, 78 Fed. App'x. 462, 465 (6th Cir. 2003) (finding that a marine terminal that prepared coal according to customer specifications was the work of preparing coal); see also *Mineral Coal Sales, Inc.*, 7 FMSHRC 615 (May 16, 1985) (determining that work activities performed on the coal in order to make it “suitable for a particular use or to meet market specifications” qualifies as the work of preparing coal).

However, the Commission has held that a commercial dock that performed functions included in the Act, such as storing, breaking, crushing, and loading, was nevertheless not subject to the coverage of the Act. *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5, 8 (Jan. 7, 1982). In *Elam*, the Commission determined that the workers did not prepare the coal for a particular use, and only performed functions necessary for the loading of the coal. *Id.* The Commission held that the facility solely performed the functions for its loading business and not for the purpose of meeting the customer’s specifications, and therefore was not subject to the Mine Act. *Id.*

V. ANALYSIS

The Secretary argues that as the SCH terminal mixes, stores, and loads coal to customer specifications, the terminal is subject to MSHA jurisdiction as performing “the work of preparing the coal” as defined by the Mine Act. Sec’y Br., 6 (citing *Kinder Morgan supra* at 1294). The Secretary asserts that the staging, drafting, and pumping of barges prior to the loading of coal is integral to the coal loading processes of the SCH terminal and should not be precluded from MSHA jurisdiction. Sec’y Br., 7. (citing *Mineral Coal Sales, Inc* at 620-621). The Secretary additionally notes the explicit Congressional directive to favor inclusion when questionable jurisdictional questions arise. Sec’y Br. 8, citing S.Rep. No. 95-181 *supra* at 3414. The Secretary concludes her argument by noting that MSHA is only asserting jurisdiction over barge areas while SCH employees are actively preparing the barges for the loading of coal and

defers to other agencies' jurisdiction prior to barge preparation and after SCH releases the loaded barges back to transit. Sec'y Br. 9.

The Respondent initially claims MSHA cannot exert jurisdiction over an accident that occurred on a river barge because the barges where the accident occurred are not owned by SCH and are not mines as classified by the Mining Act. Respondent's Br. 4, 6-8. The Respondent also relies on a ruling that declined to extend MSHA jurisdiction to a road connected to a mine site as precedent that some limitation must be applied to the expansive language of the "Mine Act" in order to avoid extension to "unfathomable lengths." Respondent's Br., 8 (quoting *Bush & Burchett Inc. v. Reich*, 117 F.3d 932 (6th Cir. 1997)). Respondent characterizes barges as being involved in the transport but not the loading of coal. Respondent's Br., 8. The Respondent goes on to list several other rulings that declined to extend MSHA jurisdiction over transporters and loaders of coal absent a showing of coal processing. Respondent' Br., 9-10 (citing *Director, OWCP v. Consolidated Coal Co.*, 923 F.2d 38 (4th Cir. 1991); *Eplion v. Director, Div. of Coal Mine Workers' Compensation, U.S. Dept. of Labor*, 794 F. 2d 935, 936 (4th Cir. 1986); *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5, 8 (Jan. 7, 1982)).

I summarily refute the Respondent's argument that MSHA cannot assert jurisdiction over activities that occur on property not owned by SCH and not otherwise classified as a mine. The question at hand is not whether has MSHA has authority over any particular set of barges or other physical property. The question at hand is whether MSHA has jurisdiction over work activities that occur on these barges as SCH employees prepare the barges for the loading of coal.

The Respondent characterizes the moveable barges as being under control of the contracting tugboat company. Resp. Br., 3, 12. However, it is clear that SCH deckhands, the SCH load out operator, and SCH management directed and performed all aspects of the barge preparation activities Mr. Wright was engaged in at the time of the accident. Foley Dep., 14-17; Kissiar Dep., 6. Furthermore, the facts have shown and the Respondent has conceded, SCH operates a coal processing and loading facility at the Calvert City Terminal that prepares and then loads custom blends of coal to customer trucks, railroad cars, and barges. Sec'y Br. 2.

As such, MSHA is right to assert jurisdiction over SCH employees engaged in activities essential to the preparation and loading of that processed coal. *See Kinder Morgan supra* at 1294. Therefore, I proceed with my analysis of the work performed on the barges where the accident occurred by determining whether or not SCH "deckhands" worked within the coal processing and coal loading activities of the SCH terminal.

Respondent contends that the Terminal is divided into three distinct facilities, and that MSHA only has jurisdiction over the land-facility. Respondent's Br. 3, 12. This argument, however, has no merit. In *Mineral Coal Sales, Inc.*, the Respondent in that case made the same argument, contending that the various activities at the facility should be examined in isolation from one another. *Id.* at 620. The Commission rejected this approach, holding that "in examining the 'nature of the operation' performing work activities listed in section 3(i), the operations taking place at a single site must be viewed as a collective whole." *Id.* at 621. The Commission explained that to hold otherwise would provide facilities the opportunity to avoid Mine Act coverage by merely adopting "separate business identities along functional lines, with

each performing only some part of what, in reality, is one operation.” *Id.* The Commission concluded that this was an appropriate approach in that case because of the “pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities.” *Id.*

Because the SCH terminal regularly performs customized blending of coal to meet customer specifications, it is proper for MSHA to assert jurisdiction over all areas of the SCH terminal involved with the preparation and loading of processed coal. *Id.* at 621. As such, the Respondent’s claim that the *Elam* ruling should be applied and exclude MSHA jurisdiction over a coal loading operation is misguided. In *Elam*, the operator did not perform any blending or processing of coal but only loaded and transported coal prepared by off-site third party contractors. *Elam supra* at 8. In this case, SCH employees blend coal to customer specification in addition to the loading of those customized coal orders within the same SCH terminal. Sec’y Br., at 2, 4. Additionally, SCH employees are assigned to differing areas of the SCH terminal on a day to day basis and sometimes work in different terminal areas during the same shift. Sec’y Br. 4.

Furthermore, it appears SCH personnel cannot recall any government regulatory agency other than MSHA inspecting the SCH terminal. Foley Dep., 21-23. As such, I find that SCH employees likely consider themselves protected by the Mine Act, regardless of their exact location, for their entire work shift when working at the direction of SCH management. From the practical standpoint of the SCH employee with numerous possible job duties, it is logical to extend MSHA work-safety rules to coal loading activities conducted on the barges and docks of the river side loading facility. It would be unreasonable to hold that a miner, who might be involved in land based coal preparation and river-based barge preparation in the same shift, loses Mine Act protection when he crosses over to an untethered barge in the river and then somehow regains that protection once he returns to the solid land of the loading dock or coal processing facility.

However, Respondent argues this exact legal theory while relying on a recent and factually-similar case that did recognize separate and jurisdictionally distinct facilities within the same terminal. *Consolidation Coal Co.*, 35 FMSHRC 439, 470 (February 5, 2013)(ALJ Koutras)(2013 WL 1385616 (F.M.S.H.R.C.)) (holding that MSHA did not have jurisdiction after a foreman drowned investigating barge conditions on river). “(*Consol.*)” In that case, the court determined that there were three separate and distinct areas of a terminal that included the preparation plant, the loading dock facility and the river portion of the dock. *Id.* at 24. The court held that the preparation and loading dock areas of the facility were under MSHA jurisdiction, but the jurisdiction did not extend to the river portion of the facility. *Id.* at 28-31. The court reasoned that jurisdiction relating to the barges located on the river is “logically and reasonably best suited for OSHA or the U.S. Coast Guard.” *Id.* at 31.

Consol., however, is an unreviewed ALJ decision and therefore not binding precedent. Additionally, I do not find the analysis in the *Consol.* decision persuasive. In *Consol.*, the ALJ bypassed binding Commission precedent that “operations taking place at a single site must be viewed as a collective whole” and instead evaluated the processing, loading, and river-based barge preparation as separate work areas. *Mineral Coal Sales, Inc., supra* at 621; *Consol.* at 26.

Although I do not concur with the ALJ's focus on distinguishing between river-based loading and land-based processing activities when performed within an integrated coal processing facility, it is critical to note significant differences between *Consol.* and the facts of this case. In *Consol.*, a plant foreman, performing a specially requested inspection, drowned after falling off an empty moveable barge in a mid-river area supposedly distinct from the loading dock facility. *Consol.* at 32. The ALJ specifically noted that "... it would appear that the location of the McIntyre Accident was on the river where no coal is processed or loaded." *Id.*

In this case, an hourly SCH employee, Mr. Kevin Myers, was performing the routine task of "drafting" a barge in line for immediate loading. Respondent's Br., 4. As part of his drafting duties, Mr. Myers was required to relay his measurements to the load-out operator located on the fixed dock location of the SCH terminal. Sec'y Br. 3. These measurements were necessary for the accurate loading of the barges. Respondent's Br. 4. As such, it is clear that Mr. Myers' duties in "drafting" the line of barges were integral and necessary to the immediate coal loading demands of the SCH fixed loading dock.

However, Respondent relies on its representation of the SCH terminal as three-distinct areas consisting of 1) a land-processing facility, 2) a fixed loading dock, and 3) water frontage (barge staging) area to claim that Mr. Meyer's location on a movable barge removes him from MSHA jurisdiction. Respondent's Br.3, 12. As the Respondent has cited *Consol* as persuasive precedent and adopted a facility classification system identical to the *Consol* decision, it appears that the Respondent must concede MSHA jurisdiction over both the land-based processing facilities and fixed loading dock areas of the SCH terminal. Respondent's Br., 3; *Consol* at 31 (holding a fixed loading dock facility that loaded customized coal onto barges was subject to MSHA jurisdiction).

The Respondent uses the *Consol* classification system, which extended MSHA jurisdiction to a similar fixed loading dock facility, to describe the SCH facility as three distinct areas, and further states that Mr. Myers was drafting a barge-line not yet connected to the winch system of the fixed SCH dock loading facility. Respondent's Brief 3, 11; see *Consol* at 31. Respondent contends from this distinction that Mr. Myers was on a barge that had not yet entered a SCH terminal subject to MSHA jurisdiction. Respondent's Br., 11. Respondent further argues that MSHA should not extend jurisdiction over river-based moveable barges because no coal processing or actual loading occurs as SCH "deckhands" prepare the barges before they are connected to the winch system. Respondent's Br., 10.

I find the Respondent's attempt to isolate routine SCH "deckhand" duties from other SCH terminal activities, particularly the loading function of the fixed loading dock, wholly unconvincing. As an initial matter, SCH personnel testified that SCH deckhands routinely attached barges to the winch system of the fixed dock loading facility and then detached those barges from the winch system after loading. Foley Dep., 14-17; Kissiar Dep., 6. As such, while a subcontractor tug company may maneuver the barges, it appears that SCH employees have unbroken control of the barges from the time SCH "deckhands" begin the drafting and pumping process begins to the time SCH "deckhands" cut the loaded barges loose from the fixed loading dock facility. Respondent's Br. 3; Kissiar Dep., 6.

Furthermore, the testimony of the SCH load out operator indicates that regardless of whether a barge is tethered to the dock's winch system, the SCH load-out operator and SCH deckhands are in constant radio communication throughout the entire barge preparation and actual loading stages of the coal loading process. Kissiar Dep., 6. As such, it is clear that SCH deckhands located on the moveable barges are a necessary part of the fixed loading dock operations, and, thus, are employed in the loading of coal.

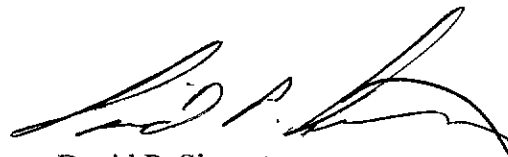
Having found that SCH deckhands load coal at a facility that prepares custom-blended coal and works in "the preparing of coal", I find that MSHA has jurisdiction over SCH deckhands involved in the regular preparation and loading of barges at the SCH terminal.

For me to rule otherwise would result in the absurd result of MSHA having jurisdiction over the SCH load out operator but not SCH deckhands, even though both SCH employees work together continuously in order to accomplish the identical goal of loading coal barges. Similarly, a contrary decision would also result in MSHA having jurisdiction over an SCH deckhand while the barge he was located on was tethered to the winch system of the loading dock but not while that same barge is instead moored just yards away from that cable system. These sorts of bifurcated jurisdictional exemptions would clearly not comply with Congress's explicit intention that the safeguards of the Mine Act be given "the broadest possible interpretation" and any jurisdictional doubts be resolved with a finding in "favor of inclusion." S.Rep. No. 95-181 *supra* at 3414.

I find that there are no genuine factual issues in dispute regarding the activities of the SCH terminal and that the Secretary is entitled to a ruling as a matter of law. For the reasons detailed above, I find that MSHA has the jurisdiction necessary to issue the citations contested in this docket.

VI. RULING

For the foregoing reasons, the Secretary's motion for partial summary decision is **GRANTED.**



David P. Simonton
Administrative Law Judge

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