FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

March 10, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2013-403 A.C. No. 44-07303-323400
v.	:	
POWER FUELS, LLC, Respondent	:	Power Fuel Blending Terminal
POWER FUELS, LLC, Contestant	:	CONTEST PROCEEDINGS:
	:	Docket No.: VA 2013-312-R Citation No.: 8204724; 4/9/13
v.	:	
	:	Docket No.: VA 2013-313-R Citation No.: 8204725; 4/9/13
SECRETARY OF LABOR MINE SAFETY AND HEALTH Administration, (MSHA) Respondent	:	Docket No.: VA-2013-353-R Citation No.: 8274726; 4/9/13
	:	Power Fuel Blending Terminal

DECISION

Appearances: Anthony D. Jones, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Secretary

Wade W. Massie, Esq., PENN, STUART & ESKRIDGE, Abingdon, Virginia, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (2000), hereinafter the "Mine Act" concerns three Section 104(a) significant and substantial (S & S) citations served on the respondent on April 9, 2013, for alleged violations of the cited safety standards found at 30 C.F.R. 77.410(c), and 77.1605(b). The Secretary petitions the Court for a civil penalty assessment of $300, for the alleged violations.

In addition to the civil penalty issues presented in this case, the respondent challenges and contests the Secretary's asserted jurisdiction based on its contention that the respondent is not a mine operator, and that its facility is not engaged in any coal mine working activities that fall within the scope and intent of the Mine Act.

Pre-trial Ruling

This case was initially designated as a Simplified Proceeding pursuant to the Commission's rules at 29 C.F.R. 2700.100, et. seq. Subsequently, the Secretary filed a motion to discontinue the "simplified" designation and to continue the matter under conventional rules. In support of the motion, the Secretary cited the jurisdictional issues raised by the respondent that involve complex issues of law and fact. The motion was granted pursuant to Rule 2700.104, without objection by the Court during a pre-trial telephone conference with the parties (Tr. 5-6)

As a result of the Court's ruling as discussed during the aforementioned conference, the respondent file a supplemental disclosure statement regarding the nature of its blending activities, and the Secretary filed a pre-hearing statement with respect to the issues in this matter including arguments in support of Secretarial (MSHA) jurisdiction. These filings and exchanges are part of the record.

Stipulations

(1) The parties agreed to the admission into evidence of copies of the three contested citations, except as to jurisdiction (Ex. G-1, G-2, G-3; ALJ-1).
(2) The parties agreed that the proposed civil penalty assessment for the citations will not adversely affect the respondent's ability to continue in business.
(3) The parties agreed that a terminalling agreement between the respondent and Virginia Electric Power Company, d/b/a Dominion Power Company, is a true and authentic copy in effect at the time the citations and may be admitted in evidence (Ex. G-4).

At the conclusion of the hearing, the parties agreed that the respondent would be classified as a small mine under the regulations and the respondent's manager confirmed that twelve employees work at the site (Tr. 139).

The Alleged Violations

The two Section 104(a) S & S Citation Nos. 8204724 and 8204726, April 9, 2013, citing C.F.R. 77.1605(b), describe defects in the braking systems on two contractor trucks that haul coal into the respondent's facility "under the direction of the mine operator" (Ex. G-1, G-3). The inspector determined the negligence level as "low" for both citations and the gravity level as "reasonably likely" and "permanently disabling" injuries.

The braking defects described for Citation No. 8204724, concern a steering axle brake out of adjustment on the truck tractor, and an inoperative rear axle brakes on a trailer being pulled by the tractor, with no braking force supplied by the brake pushrods that could not move. The braking defects described for Citation No. 8204726, in part state that the left truck steering axle brake was out of adjustment with a continuous air leak through a defective air brake value above the center trailer axle being pulled by the truck.

Citation No. 8204725, April 9. 2013. Citing 30 C.F.R. 77.410(c), states that the backup alarm provided on the cited contractor truck was not being maintained in a functional condition in that when the driver placed the vehicle in reverse, the backup alarm failed to function due to a broken wire. The truck is used to haul coal into the facility "under the direction of mine operator" (Ex. G-2). The inspector determined the negligence as "low", and the gravity level as "reasonably likely" and "permanently disabling" injuries.

Mandatory safety standard 30 C.F.R. 771605(b), requires mobile haulage equipment to be equipped with adequate brakes. Section 77.410(c) requires mobile equipment such as "tractors" and "trucks" to be equipped with a warning device that gives an audible alarm when put in reverse and be maintained in functional condition.

The Secretary's Testimony

MSHA Inspector Thomas R. Bower testified that he has served in that capacity since January 7, 2007, and he described his education, including a bachelor's degree from the University of Virginia at Wise and his prior mining experience from 2001 through 2006 (Tr. 20-21). He confirmed that his initial visit to the respondent's facility was December 12, 2012, and that he conducted regular mine safety and health inspections over a period of 12 different days and was familiar with the work that is done there (Tr. 22). He observed contractor coal trucks, trailers, and tractors hauling coal, refuse materials, gob coal, and "midds", a coal byproduct from a preparation plant, coming into the site. The materials were weighed and sampled and then taken to designated stockpile areas. The truck drivers were told where to dump their loads by the loader operators and the foreman of the site (Tr. 22-23).

He further explained that the coal was stored, blended, and loaded as needed for Dominion's power plant, then taken back out, weighed again, sampled again, and then shipped to

the power plant (Tr. 23). He stated that front-end loaders were used to blend the coal from one stockpile to another that were marked for each type of analysis "so they'll know how to blend it." He confirmed that between the time the coal arrives at the site and the time it leaves, it is stored and blended in preparation for shipment to the power plant (Tr. 24). He confirmed that he began his second inspection at the site on April 1, 2013, and clarified that he was not at the site for a total of five months, and that his inspections last on and off approximately two to three weeks at a time and that two inspections were performed during two six-month intervals, and that he was at the site over a period of several month several times (Tr. 25).

Mr. Bower identified Exhibit G-1 as Citation No. 8204724, citing a violation of 30 C.F.R. 77.1605(b), for braking defects on a contractor's tractor trailer coal truck. He stated that there were numerous braking defects as stated in the condition or practice noted in item #8 of the citation, on both the tractor and the trailer that he considers as one unit, and he summarized the condition as "faulty brakes" (Tr. 26-27). He confirmed that he discussed the citation and his reasons for issuing it with the site foreman, Mike Hendrickson, and informed him that the truck was traveling the same roadways that mine personnel used and exposed them to the hazards while the truck was operated on the property (Tr. 27). The citation reflects that the truck was taken out of service pending repairs.

Mr. Bower stated he based his "S & S" determination on the fact that the cited truck and tractor unit had a 25 percent loss of braking power that exceed the guidelines fixed by the Commercial Vehicle Safety Alliance that any braking loss over 20 percent reaches its out-of-service criteria (Tr. 27-28, 30). He believed that two persons would be likely exposed to a hazard in the event of any accident, namely the driver and another miner, as well as others who may be on the roadway (Tr. 28-29).

Mr. Bower stated that he based his "reasonably likely" injury determination on his accident investigator experience involving truck accidents under similar defective conditions that resulted in disabling back and traumatic injuries, and broken bones. He agreed these examples are "worst case scenarios" and that lesser injuries were conceivable (Tr. 30-31). He confirmed that foreman Henderson was upset about the conditions of the truck brakes and that he called the trucking company and told them that they had to do better with their equipment (Tr. 31). He confirmed that he based his low negligence finding on the fact that the foreman may travel with the trucks at times during his shift but he did not directly oversee the truck maintenance, and that he also cited the contractor truck operator for the same violation (Tr. 32-33).

Mr. Bower stated that he also issued S & S Citation No. 8204725, a violation of 30 C.F.R. 77.410(c), because the backup alarm provided on a contractor trailer truck failed to function when the transmission was placed in reverse and the alarm did not sound (Ex. G-2, Tr. 33). He stated he determined an injury was reasonably likely because the truck traveled in congested areas, it was observed backing up in congested areas, and it had an obstructed rear

view pulling a 34 foot trailer. The truck backs up in congested areas where numerous people and other pieces of equipment are present.

Mr. Bower determined that any injury would be disabling if anyone was backed over by a 150,000 pound unit, and this included crushing injuries. He believed one person among those operating a loader or sampling the coal would be affected, and he also concluded it was an S & S violation because the cited trucker was in congested areas and it was observed backing up in those areas (Tr. 34). He based his low negligence on the same reason as the prior cited violation because the foreman was not responsible for truck maintenance and confirmed that he also cited the contractor truck operator for the same violation (Tr. 34-35).

Mr. Bower confirmed that he issued Citation No. 8204726 citing a violation of 30 C.F.R. 77.1605(b), because the same truck previously cited for a defective backup alarm had a brake out of adjustment on the tractor and a continuous air leak and defective air valve on the trailer being pulled as a unit (Ex. G-3; Tr. 38-39). He explained that the loss of air pressure would result in a loss of braking force to stop the unit because the brakes would not work as they are designed (Tr. 39).

Mr. Bower stated that he based his reasonably likely injury determination on the fact that a combination of a brake out of adjustment and a continued air leak makes it reasonably likely that a brake failure would occur and cause a wreck. He explained that the truck hauls heavy loads over inclined roads, traveling with other vehicles, and that any loss of brakes could result in a truck runaway over the top of other vehicles resulting in crushing injuries. Under these circumstances, he concluded that the violation was S & S and two persons, the truck driver and any other vehicle driver would be affected (Tr. 39-40). He confirmed that his low negligence determination was based on the same reason for all three citations, namely, the fact that the foreman was not directly responsible for any truck maintenance, but did travel sometime during the shift in the same area traveled by the trucks (Tr. 41).

On Cross-examination, Mr. Bower stated that his inspections were regular inspections, and that even though he is a surface inspector and accident investigator, he was not investigating any accidents when he issued all of the citations. He made no decisions whether the respondent's site was a mine within the meaning of the Mine Act and was simply following his instructions to cite any violations that he found (Tr. 44-45). He confirmed that when he issued the citations, he was not aware of the agreement between the respondent and Dominion, and did not interview anyone at Dominion about the respondent's job performance or operations. He explained that he spoke with the respondent's foreman, Mike Hendrickson, who was at the site on a daily basis, and Mr. Walter B. Crickmer, who has later identified as the manager of Power Fuels, LLC, the respondent (Tr. 45, 79).

Mr. Bower stated that the contractor trucks that he cited were inbound trucks that were bringing solid fuel from any producing facility to the respondent's site. He confirmed that a defective truck entering the site may not necessary, in and of itself, constitute a violation. However, pursuant to MSHA's policy, he is required to make a determination whether or not the respondent's personnel are exposed to any hazard, and if not, the violation would be attributable to the contractor if it did not involve the respondent's employees (Tr. 46-47).

Mr. Bower confirmed that he issued the violations to the respondent because trucks entering its site with defective brakes and a backup alarm potentially involved the respondent's employees. He did not know whether the trucks were contractors for the respondent or contractors for the producing mine entities. He further stated that while he was not aware who contracted the trucks, he was obligated to inspect them during his inspection at the site and that the question of who contracted them was not relevant (Tr. 48-49).

Mr. Bower did not know who owned the materials hauled into the site by the trucks, and did not believe this was relevant. He estimated that 30 – 40 trucks enter the site daily and that during one of the 12 days of his inspections, he may have randomly selected 10 to 12 trucks to inspect. He does not inspect every truck that comes onto the site and has inspected trucks that did not have any violations. As far as he knew, all of the cited trucks arrived safely while traveling inbound to the site (Tr. 50-51).

Mr. Bower confirmed that his statement in the citations that the trucks are "under the direction of the mine operator", referred to the respondent's foreman, Mr. Hendrickson, and because the trucks were on the site (Tr. 51). He stated that he has also observed some wood chips biomass product at the site and that it is handled by the same employees with the same equipment used for handling the solid fuel (Tr. 52-53). In reply to further questions, Mr. Bower stated that the material blending that he observed consisted of "coal, midds, gob, the refuse material blended together", coal and coal byproducts. He observed wood chips that were stored and never witnessed it being blended with those products (Tr. 53-54). He explained that the coal blending was accomplished by using bulldozers to stockpile the materials and front-end loaders moving it from one stockpile to another (Tr. 55).

Supervisory Special Investigator, Robert D. Clay testified that he has been employed with MSHA for 22 years and is responsible for violations of section 110 of the Act, and other duties as assigned by District 5, in Norton, Virginia. He detailed his prior 16 years of mining experience in the private sector, including mine foreman and equipment operator positions in surface and underground mines. He also performed duties with MSHA as an inspector and field office supervisor, and was familiar with the respondent's facility (Tr. 57-59).

Mr. Clay stated that he first became familiar with the respondent's site after an inspector informed the assistant district manager that he observed coal trucks coming off the state road that

were not going directly to Dominion's power plant and were turning off somewhere else. He was asked to investigate the respondent's operation because there was no known preparation plant at that location. He went to the location on May 22, 2012, and from his vantage point off the property on a country road he observed coal trucks going on the property. He could only observed what he believed was a small sampling unit that appeared to be sampling whatever went through the gate, and a small scale (Tr. 59-60).

Mr. Clay stated that he was approached by the respondent's foreman, Bobby Ketron, who invited him on the property and took him to the mine office consisting of a small trailer or building. Mr. Kentron then took him to a "yard" area that he called a "blending yard" where Mr. Clay observed signs posted indicating "There was a yard there, a blending facility, signs coming onto the property". He also observed end loaders, trucks coming on the property, a coal sampling unit, scales, and a water tank on an elevated roadway (Tr. 60-61). Mr. Kentron told him that coal trucks would deliver coal to the yard, dump it and that end loaders would blend the coal together for a certain specification. It would then be stored and eventually transported to Dominion's power plant directly across the small county road (Tr. 61).

Mr. Clay identified Exhibits G-6 and G-7 as photographs of two signs stating "Virginia City Fuel Blending Terminal, ¼ mile on right", and "Blend Yard Area A", and assumed they were created by the respondent. It was his understanding that the respondent referred to the facility as a blending terminal (Ex. G-6). He stated that what was stored in Area A appeared to be a pile of coal and the sign on the property pointed to the "blend yard storage Area A" (Ex. G-7). He explained that during his visit to the facility he observed several trucks stopping at a sampling area and a sample being removed from the coal truck trailers that drive across a set of scales. The tractor and trailer are then driven to yard storage A where the coal is dumped and pushed together and blended with the front end loaders. The blended coal is placed back in the truck with the same loaders and travel across a set of scales again and travel off the property that he assumes was taken across the road to Dominion's power plant (Tr. 65-66).

On cross-examination, Mr. Clay stated that he could observe portions of the respondent's property while parked by the road, and more of it after he was invited in by Mr. Ketron. He stated that the Dominion power plant was adjacent to the respondent's site across the road, and the trucks he observed were turning onto the respondent's site. He confirmed that he did not conduct any inspection on Dominion's property (Tr. 67-71).

Mr. Clay stated that he was not aware of any other power plants in MSHA's District 5, and that he was only requested to inspect the Dominion location. He speculated that in the event he observed the trucks turning into that plant, he probably would have inspected that area if requested to do so by his supervisor (Tr. 73). He confirmed that he was not aware of any discussions within his district concerning any "debate" about MSHA's jurisdiction over the respondent's site, or any other sites (Tr. 74-75). He confirmed that his inspection did not include

any interviews with anyone on Dominion's property, or the producers of the materials that were trucked into the respondent's site because he did not know who they were. He confirmed that he did not observe the handling of any biomass at that site because he was not sure what it was (Tr. 76).

Walter B. Crickmer, the respondent's co-owner and site manager, stated that the site is located on 106 acres across the road from the Virginia City Hybrid Energy Center (VCHEC), owned and operated by the Virginia Electric and Power Company that is commonly known as Dominion Power, of simply "Dominion" (Tr. 79-81). He identified Exhibit R-1 as an aerial photograph of the power plant, as well as the respondent's site labeled "Power Fuels LLC Fuel Handling Facility", and he was unaware of any citations issued on the plant property (Tr. 82-89).

Mr. Crickmer stated that he has a degree in Geology and is a geologist with previous coal mine experience that began in 1970, and served as president of the Clinchfield Coal Company that operated several mines and preparation plants. He also worked for the Pittston Coal Company drilling gas wells and was engaged in other enterprises processing wood chips and rebuilding mine equipment (Tr. 120, 122). For the past ten years he and several partners have owned and operated a business called Gobco that reclaims gob piles, and for the first eight years it supplied gob coal products to several companies such as Alpha, Taco, United, and Warscho. During that time, the company won many state reclamation awards and a Federal Department of the Interior award for its tree and "green history" (Tr. 121-122).

Mr. Crickmer described the Dominion plant as a 600 megawatt facility placed in operation two years earlier at the same time the respondent's site was placed in operation. He stated the plant was designed differently from most coal-fired power plants run with high BTU coal content and relies on a very critical BTU low, medium 7500 BTU, or as low as 6500-8000 product that changes daily for the size of the coal product that is going by conveyor belt into the furnaces that produce heat for its generation station. In order to maintain quality fuel, it is critical to maintain the low BTU coal content that supplies the furnaces (Tr. 81-82).

Mr. Crickmer stated that the plant burns 10,000 tons of fuel material a day. An average 8,000 tons is supplied by the respondent's facility that transports it by trucks to the site, and 2,000 tons is trucked directly to the plant from other locations (Tr. 89). Mr. Crickmer described the fixtures and facilities on the respondent's property as a terminal office, a set of scales, an auger sampler owned by a contractor. The respondent owns the office and scales, as well as a small block building for storing grease, lubricants and work parts, and a pump house for a water tank used for road dust control. He further confirmed respondent's ownership of four storage yards, a sediment pond, and a $40,000 bath house facility required by MSHA (Tr. 90-91). He described the equipment as four rubber-tired end loaders equipped with computerized bucket scales, a dozer, a water truck, street sweeper, a road maintenance truck, a mobile stacking conveyor, and a pickup truck (Tr. 92).

Mr. Crickmer stated that the respondent handles different kinds of fuels purchased by Dominion, including wash coal from preparation plants, run-of-mine-coal, coal refuse, and gob, biomass wood products. Also included is wood products and biomass consisting of trees, "week" and brush that is ground to a certain specification and blended in with solid fuel at Dominion's furnace. He stated "it's just wood that's been ground up, which is critical and it has to be sized properly to work in the plant" (Tr. 93).

Mr. Crickmer described the Dominion Power Plant as "a very special" operation designed to burn coal, biomass, blended in with limestone for emission control". He explained how the materials are processed and burned with the special specified fuel because all of the materials have to meet the proper specifications to react properly in the furnace burn chamber that may not otherwise be used at other power plants, and this includes coal refuse, gob, and wood (Tr. 94-95). He stated that the respondent currently receives coal or gob from approximately 15 to 16 Kentucky and Virginia producers. He confirmed that the respondent works for Dominion Power under the stipulated terminalling agreement (Tr. 96-98; Ex. G-4).

Mr. Crickmer stated that the respondent does not, and never has, owned any of the coal related materials delivered by contractor trucks to its site. Pursuant to the agreement with Dominion Power, the respondent is paid so much a ton for the materials as weighed at the scales. Further, all of the respondent's operational costs, including the wages of the foreman and hourly employees, except for the manager, are fully reimbursed by Dominion to the respondent. All fuel materials delivered to the site are paid for by Dominion directly to the producers (Tr. 100-101).

Mr. Crickmer explained that on any given day, the fuel materials ordered by Dominion Power to be trucked to the respondent's site are weighed and recorded by the computerized scales and sampled by a third party contracted by the respondent, and then trucked to any of four storage yard areas (A through D), where it is dumped, segregated, and stored into one particular pile for particular producers. The fuel delivered for that day is kept segregated for that day because it has a certain quality. This procedure is followed for all 16 producers who delivered the fuel materials that day. Dominion Power and the respondent would receive computerized reports reflecting the exact fuel quality for the fuel delivered that day (Tr. 102-103; Ex. R-3). Mr. Crickmer explained the fuel blending process that takes place as follows at (Tr. 103):

> So we keep that fuel segregated for that one particular day because it has a certain quality. And we do this for all 16 producers, whoever we have coming that day. And then we get all the qualities the next day. And then Dominion directs us daily to take this quality coal, so much of this material and so much of that material and so much of this material and blend it together by one bucket of this, two buckets of that. Literally is says that. You have the sheets there that come from Dominion Power that says that into a pile.

In the event the blending samples reflect a need to improve the quality of the material, it will be blended as described by Mr. Crickmer at (Tr. 104):

> So we will re-blend the entire pile again based upon their direction, add so much more of this pile to it, be it a higher BTU or a lower BTU, because that is so critical for the firing in the plant, this blended fuel spec, that it has to be right on the mark. So Dominion makes that call. And sometime we'll reblend a pile two or three times to get it exactly what they want before they take it across the street.

Mr. Crickmer stated after the fuel materials are blended at the desired quality range, the respondent uses two or three contractor truckers who are allowed on Dominion Power's property to deliver the desired daily tonnage ranging from 8,000 to 15,000 tons across the street to the plant. He stated that on any normal operating day the respondent will handle 300 to 500 tractor trailers coming in and out of its site and 150 to 200 truckloads a day will go to the plant (Tr. 104-105).

Mr. Crickmer identified Exhibit R-2 as a survey map of the respondent's property showing the locations of the four fuel material storage areas A through D, the truck scales, and the auger samples (Tr. 105-106). He further identified Exhibit R-3, as a typical example of a blending instruction sheet, provided to the respondent from Dominion every day, and sometimes bi-daily, identifying a particular storage pile and instructions to "Mix this blend, and it tells you exactly, and the moisture" (Tr. 107-108). Further examples are stated as follows at (Tr. 108):

> THE WITNESS: No, that's okay. This right here says "Please blend 908A –which is our product – "5 buckets of Omega with 4 buckets of Gobco/ETI for pile Aa."
> BTU should be 7950, 39 percent ash, 5.9 percent moisture. "I have attached a spreadsheet with calculations." In yard B –-

Mr. Crickmer cited an example of blending calculations made by the respondent with respect to the fuel purchased by Dominion from all of its producers as follows: (Ex. 3, Tr. 109).

> THE WITNESS: This is how many buckets. There's 207.98 buckets in that pile. This is the percent. And in the blended pile they want two buckets of that. They want three buckets of Pevler. They want three buckets of IBCS and one bucket of South East. So it actually gives us a 6.5 moisture, a 39 ash, a .9 sulfur, and 7600 BTU. Now, these are all critical things for that power plant's furnace. That BTU has to be right on the money. That sulfur has to be within the limits required by the law. And, of course, ash is, you know, a byproduct of the BTU. (Ex. R-3; Tr. 109).

Mr. Crickmer further identified information received daily by the respondent from all of the coal fuel producers with respect to the different quality specifications utilized during its blending process. He stated the information is tracked by Dominion's computers "so that all these products are properly blended together" (Tr. 112). He explained that Dominion's plant is not a standard coal-fired plant that utilizes fuel that is blown into a furnace. He described Dominion's plant as "a fluidized bed plant" that utilizes other materials such as limestone for its furnace reaction chambers to insure the required critical combustion and the removal of emissions (Tr. 110-111). He stated that OSHA, EPA, and "DEQ" have jurisdiction over the plant's operations (Tr. 111).

Mr. Crickmer believed that the coal fuel delivered to the respondent's site has been crushed and sized, and he assumed that the producers of the coal have done this prior to its sale to Dominion in order to meet its specifications. No coal crushing, sizing, or washing is done at the respondent's site. He stated that "all we do is take different fuels purchased by Dominion, which they own, and we blend it to whatever specifications they want for the next day to burn at the plant on two days". He confirmed that the coal meets Dominion's preparatory size specifications, and if not, Dominion would reject the coal until it was properly sized (Tr. 114). He explained that the Dominion plant is unique in that all fuel material is trucked in daily, and when its inventory is full, it only has a nine to ten day supply, whereas most coal-fired plants have 60 to 90 day inventory. He stated that the respondent provides a service to Dominion by storing an additional eight days of purchased fuel on its site (Tr. 115).

Mr. Crickmer stated that the respondent has never been in the coal business, and that its site was designed to perform the daily work that he has described. He confirmed that he was familiar with the work performed at coal preparation plants and was responsible for such a plant when he worked at Clinchfield Coal. He explained that a preparation plant washes, screens, and sizes coal pursuant to the specified specifications from the customers it services (Tr. 122-123).

Mr. Crickmer stated that the respondent does nothing to improve the quality of any fuel product, and it never screens, washes, or sizes it "other than take exactly what's been brought in there by Dominion and put it in a blend to fuel their furnace" (Tr. 123). He explained that the coal was crushed and screened by the coal producers to meet Dominion's BTU, sulfur, or moisture specifications. He stated that the respondent furnishes approximately 80% of the fuel it handles and delivers directly to the Dominion plant, and that 20% of the material does not come to the respondent's site and is delivered directly by truckers ordered by Dominion (Tr. 123-124).

Mr. Crickmer stated that the "fine tuning" of the "spec fuel" that arrives at the respondent's site is not done by any of the coal producers, and the respondent receives a variety of coal blends purchased by Dominion that is to be blended before it can be delivered to its plant. He explained that coal blending, sampling, and analysis takes place at the respondent's site daily, and changes daily "six days a week all year long" (Tr. 124).

Mr. Crickmer stated that in the event the respondent did not do the blending work, Dominion would have to it because the plant requires the desired fuel specification (Tr. 125). He explained that when he established the respondent's site he consulted with the State Department of Mining Minerals and Energy and informed its director that the respondent "would work for Dominion to handle trucks, store their fuel, re-blend it to spec and haul it across the street". He stated that he was informed that he was not a coal mine, did not need a mine license, was not a wash plant, and was not subject to the State's jurisdiction, and was referred to OSHA signs, brochures, and forms for visitors to sign, and operated that way until MSHA appeared (Tr. 125-126).

On cross-examination , Mr. Crickmer confirmed that the respondent blends coal on behalf of Dominion, stores it at the respondent's facility and loads and delivers it across the street to the Dominion plant as directed. He confirmed that the stipulated Terminalling Agreement defines its work responsibilities on behalf of Dominion with respect to the blending and delivery of the coal to the plant. He stated that the respondent is a custom blending facility for Dominion and that the work it performs is done to meet Dominion's requirements and specifications (Tr. 127-128). He characterized this work and the term "custom" as follows:

> A. It makes a buyer's spec fuel that really changes daily or weekly. And they change it based upon the heat rate of the furnace. It's a custom fuel. And we do that work for Dominion. We make that spec fuel for them with fuels that they own. They buy fuels from many people and we take those fuels and we make that spec fuel. (Tr. 128).

Mr. Crickmer further confirmed that "solid fuel" is defined by the agreement as coal, coal refuse, and coal midds or gob (Tr. 129). He stated that the biomass handled by the respondent is covered by a separate agreement and it is the only product that it has ever purchased and owned for that business. He confirmed that it provides biomass for Dominion and ground end sized 1,000 truckloads of wood materials in 2012, to Dominion outside of the agreement (Tr. 129-130).

Mr. Crickmer explained that the respondent is not responsible for any erroneous blend or loss in a stockpile, and commented "that is all 100 percent Dominion", and "if they told me to blend it this way and it came out something they didn't like, it's not my responsibility. I only do what I'm told to do". He confirmed that Dominion can perform re-blending at its site through its reclaim systems that senses sulfur, moisture, or ash in both piles (Tr. 137-138).

The Jurisdictional Issues

The Secretary's Arguments

The Secretary relies on the testimony of MSHA Inspector Thomas C. Bower, who confirmed his site inspections in December 2012, and April 2013, when he observed the loaded coal trucks transporting the coal onto the property where it was weighed, sampled, and stored in designated areas, and blended using front-end loaders that mixed and combined different types of coal and stored in separate stockpiles to create a custom coal blend.

The Secretary further cites the testimony of MSHA Special Investigator Robert D. Clay, who initially observed coal trucks entering the site, and his further observations after he was invited onto to the property by site foreman Bobby Ketron. Mr. Clay observed front-end loaders, weighing scales, a coal sampling unit, a water tank, and several coal trucks coming onto the property. He testified that Mr. Kentron informed him that coal trucks delivered coal to the blending yard where front-end loaders blended the coal together to meet certain specifications. The blended coal was stored and eventually transported to the Dominion Power Plant across the street from the respondent's facility.

The Secretary further relies on the testimony of Walter B. Crickmer, the respondent's co-owner and facility manager who confirmed the Terminalling Agreement between the respondent and Dominion Power specifying the services provided by the respondent, including the blending of solid fuel in accordance with the requirements of the customer, and the loading of trucks and shipment of solid fuel to Dominion's plant (Tr. 127-128); Exhibit G-4, pg. 4.301(a)(iv)(v)).

The Secretary cites the definition of "solid fuel" in the Agreement as "coal, coal refuse, coal midds, or gob" and refers to Dominion Power as the "Customer" of Power Fuels, LLC (Ex. G-4, at 1, 2; Tr. 129). The Secretary cites Mr. Crickmer's testimony that the respondent receives daily instructions, sometimes bi-daily, from Dominion Power that directs it on how to create a custom coal blend that meets Dominion Power's specifications as noted in Exhibit R3.

The Secretary further cites Mr. Crickmer's testimony that it was "critical" for the respondent to make a custom coal blend that meets Dominion's precise specifications in order for the power plant furnace to operate correctly and his explanation that "All we do is take different fuels purchased by Dominion, which they own, and we blend to whatever specifications they want for the next day burn at the power plant" (Tr. 114). The Secretary refers to the following testimony and admissions by Mr. Crickmer:

1. The respondent "provides a big service" for Dominion because it stores large quantities of coal, and that since Dominion can only store up to eight days of power-

plant-ready coal at its plant, storage at the respondent's facility reduces Dominion's storage needs on its own premises (Tr. 115, 126).

2. The respondent's facility has four different storage areas where trucks are routinely loaded with blended coal and taken to an auger sampler that tests the coal to insure it meets Dominion's specifications and transported across the street to the Dominion Power Plant (Tr. 102-103, 126; Ex. G-7).

3. The respondent "is a custom blending facility" for Dominion Power, blends coal that it receives from approximately 16 different producing mines, and that the work it performs is done for the purpose of meeting Dominion's specifications and requirements (Tr. 97, 126, 128).

The Secretary asserts that under the plain language of the Mine Act, the respondent's blending facility is a "mine" for purposes of Mine Act enforcement jurisdiction. The Secretary cites Section 4 of the Act that each "coal or other mine" whose products affect commerce shall be subject to the Act, and that "Coal or other mine" is defined in Section 3(h)(1) of the Mine Act to include:

> (C) lands . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form . . . 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)(i)).

The Secretary cites the definition of "work of preparing the coal" at Section 3(i) of the Mine Act as:

> . . . the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of the coal mine (30 U.S.C. 802(i)).

The Secretary asserts that the record in this case makes it abundantly clear that the respondent is a custom coal preparation facility that is "used in" the "work of preparing coal", and that it undisputed that it mixes, blends, loads, weighs, samples, and stores bituminous coal for the sole purpose of meeting the specifications and requirements of its customer Dominion Power. The Secretary concludes that these coal preparation activities confer Mine Act enforcement jurisdiction over the respondent's blending terminal, and that a plain reading of Mine Act Section 4 requires the conclusion that the terminal operation is a "custom preparation facility" within 30 U.S.C. 802(h)(1). In this regard, the Secretary cites Mr. Crickmer's

admission that the respondent "is a custom blending facility" for its customer Dominion Power (Tr. 128).

The Secretary cites the Commission's decision in Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985), affirming my jurisdictional finding over a commercial loading facility, a railway siding that the Secretary states performed coal preparation function similar to the work performed by the respondent in the instant matter, namely the blending of different types of coal together to meet customer's specifications and loaded the blended coal for transport activities are specifically listed in the Mine Act as constituting "the work of preparing the coal". In that case, although the Commission stated that merely performing one or more of the statutorily enumerated activities is not solely determinative of whether the facility is properly classified as a "mine", it nonetheless noted that the inquiry must also focus on the nature of the operation performing the activities and whether the work is "undertaken to make coal suitable for a particular use or to meet market specifications".

The Secretary emphasizes that the Commission ultimately concluded that the operations taking place at Mineral Coal Sales, when viewed as a collective whole, indicated that the facility was a "mine" because it performed preparation work to make coal suitable for customer specifications, and rejected Mineral Coal Sales' contention that its work of merely blending different types of coal from different stockpiles under the direction and control of another entity does not constitute coal preparation. The Secretary concludes that the preparation work performed at the Mineral Coal Sales facility is virtually identical to the blending work performed by the respondent and falls within MSHA's jurisdiction.

The Secretary states that assuming arguendo that the court finds that Sections 802(h)(1)(C) and (i) are ambiguous with respect to whether they allow MSHA to assert enforcement jurisdiction over a custom coal preparation plant that engages in further preparation of previously processed coal to meet the specifications of the coal's ultimate consumer, the Secretary's reasonable interpretation of the Act is entitled to deference. Citing Secretary v. National Cement Co., 573 F.3d 788 (D.C. Cir. 2009I) (deferring to MSHA's finding of Mine Act jurisdiction over a road leading up to a cement plant), and Secretary v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984) (deferring to MSHA's jurisdictional determination that a slate gravel processing facility that did not extract slate but processed it for commercial purposes was a "mine" within the meaning of the Mine Act.

The Secretary argues that his interpretation that the work performed at the respondent's blending facility constitutes the "work of preparing the coal" is reasonable and entitled to deference, citing the cases of Mineral Sales, Inc. and Kinder Morgan Operating, supra with "strikingly similar facts to the case as bar" with respect to the undisputed statutorily enumerated coal preparation activities performed by the respondent that include the "mixing, storing, and loading of bituminous coal" functions specified in 30 U.S.C. 802(i).

The Secretary maintains that his interpretation of 30 U.S.C. 802(h)(1)(C) and 802(i) is reasonable and that by enacting the Mine Act Congress sought to prevent "unsafe and unhealthful conditions and practices in . . . coal or other mines," 30 U.S.C. Section 801(b), and that it furthers the safety and health goals of the Act to cover, to the maximum extent consistent with the statutory terms, workers subject to the conditions, practices and hazards associated with coal preparation, and that deference to the Secretary's interpretation is additionally warranted because 30 U.S.C. 802(h)(1)(C) "expressly authorize(es) the Secretary to define what constitutes a "mine." Otis Elevator Co. v. Secretary, 921 F.2d 1285, 1288 n.1 (D.C. Cir. 1990).

The Secretary states that the respondent introduced no facts or evidence to support its contention that MSHA has no jurisdiction over its blending facility and rejects its principal defense that its mixing, storing, and loading work is not the type of coal preparation work that "is usually done by the operator of the coal mine", and as such should be treated like the ultimate consumer of the coal instead of a mine operator. The Secretary responds to the respondent's contention that if it did not perform the custom blending work for Dominion, Dominion would have to perform these coal preparation activities for itself , and takes the position that the respondent seeks to be treated as the ultimate consumer of the coal, instead of the contractor it actually is that prepares the coal to meet the specifications of the ultimate consumer, and that its argument has no basis in fact or logic and should be rejected.

In response to the respondent's suggestion that the Secretary's jurisdictional interpretation would expose any place that mixes, stores, or loads coal to MSHA's enforcement scrutiny, the Secretary states that simply storing or loading coal would not subject the coal end-user to MSHA's jurisdiction. The Secretary concludes that his asserted enforcement jurisdiction is consistent with the Commissions analysis in Elam, supra, and the reasoning stated in Mineral Coal Sales, supra, and Kinder Morgan Operating, supra.

The Secretary further cites the Third Circuit Federal Court of Appeals decision in RNS Service, Inc. v. FMSHRC, 115 F.3d 182 (1997), concerning a site that processed coal refuse that was delivered to a co-generation facility generating electricity and steam where it was further prepared in a useable form by its ultimate consumer. The Court affirmed the Commission's functional analysis holding that the loading and transportation of the coal that occurred at the site were sufficient to render the site a mine, and rejected the assertion by RNS Services that the Commission made a per se ruling that simply loading and transporting the coal rendered the site a "mine".

With respect to the facts supporting the alleged violations, the Secretary relies on the testimony of Inspector Bower as previously noted, including the joint stipulated evidentiary admission of the citations were received for the record, without objection, except as to

jurisdiction. Further, the Secretary takes the position that if MSHA's jurisdictional claims are affirmed, the citations and proposed civil penalty assessments should also be affirmed..

The Respondent's Arguments:

The respondent argues that the critical question in this case is whether any mixing, storing, or loading of coal is subject to the jurisdiction of the Act, as contended by the Secretary, or whether the mixing, storing, and loading must be the type of work usually performed by the operator of a coal mine. The respondent asserts that if the Secretary is correct that any mixing, storing, or loading of coal is sufficient to establish MSHA jurisdiction, then any consumer who mixes, stores, or loads coal is the operator of a coal mine. Conceding the fact that the Mine Act confers broad jurisdiction on MSHA, the respondent maintains that it does not go that far.

The respondent argues that the work normally performed by coal consumers is not subject to the Mine Act, and that in the instant case the respondent is doing blending work for the consumer of the coal, not for the producers of the coal. The respondent maintains that the work that it performs is the type of work that is generally performed by a consumer, and the fact that the consumer has contracted with the respondent to perform this work, instead of doing it with its own employees, does not change the character of the work or allow MSHA to assert jurisdiction.

The respondent relies on several Commission and ALJ jurisdictional issue decisions in support of its case. Addressing the critical issue with respect to the connection that must exist between the work in question and the usual work of mining, the respondent cites Secretary of Labor v. Oliver M. Jr., Co., 4 FMSHRC 51 (1982I), a case involving an operator of a commercial dock on the Ohio River, and affirming an ALJ decision that Elam's facility was not a "mine" subject to Mine Act jurisdiction.

The respondent states that although Elam crushed and loaded coal onto barges, the Commission held that the dock was not a "coal or other mine," and that just because it handled coal it did not mean it was engaged in "the work of preparing the coal." To fall within the definition, the Commission concluded that the work must involve more than the "breaking crushing, sizing, cleaning, washing, drying, measuring, storing, (or) loading" of coal. The work must be the kind of work "usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities . . . ".

With regard to Secretary of Labor v. Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985), the respondent points out that the Commission addressed a different situation involving a tipple operator at a siding that stored, mixed, crushed, sized, and loaded coal in order to make it "suitable for a particular use or to meet market specifications." The company processed the coal

for brokers, not consumers, and the Commission held that the company's operations were subject to the Act.

Citing my decision in Marion Docks, Inc. v. Secretary of Labor, 10 FMSHRC 1598 (1988), a case involving a coal loading tipple facility that loaded and shipped coal by river barges to several utility customers who purchase the coal from brokers, the respondent points out that the facility was not the consumer of the coal, and did not work for the consumer of the coal, and only worked for brokers who sold the coal to utilities.

The respondent cites my decision in Secretary v. Consolidation Coal Company, 35 FMSHRC 439 (2013), involving a coal loading facility that received processed coal from an adjacent preparation plant. The respondent states that the case involved two facilities, namely (1) a coal loading facility that was essentially an extension of the preparation plant, and (2) a barge onto which the coal was loaded. The respondent states that the loading facility where the work of loading work that included the layering of the coal to meet the mine customer's specifications was held to be subject to the Mine Act, "but the barge was not, . . . and simply transported the loaded coal" (pg. 9, post-hearing brief). The respondent further addresses two Federal Court of Appeals cases relied on by the Secretary with respect to what constitutes a mine. RNS Services, Inc. v. FMSHRC, 115 v. F. 3d 182 (3d Cir. 1997), and Kinder Morgan Operating, L.P. v. Chao, 78 F. App'x 462 (6th Cir. 2003) (unpublished); (Commission Decision at 23 FMSHRC 1288, 1294 (2001)).

With respect to RNS Services, Inc., the respondent states that RNS loaded coal refuse at a refuse site, and that the Court, in a 2-1 decision, the majority applied a functional analysis focusing on the nature of the work being performed at the site and held that RNS was subject to the Act. Even so, the respondent argues that the majority disclaimed the view that any loading of coal was subject to the Act, and that in order to constitute a mine, the coal must be loaded "at a place regularly used for the purpose, in preparation for further processing, and that the "loading of the coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user. . . ." Id. At 185. The respondent notes the dissent argument that the Commission had applied a per se ruling making any loading of coal subject to the Act. Id. At 192 (Alito, J., dissenting).

With regard to the Kinder Morgan Operating decision, involving a marine loading facility that received and loaded coal, mostly for the Tennessee Valley Authority (TVA), and that the TVA purchased the coal from numerous producers, and that Kinder Morgan stored and blended the coal into different products for different plants. The respondent points out that the Commission split 2-2 on whether the Mine Act applied to Kinder Morgan's operation, and concedes that the 6th Circuit found MSHA jurisdiction and adopted the reasoning of the two Commissioners who voted to uphold jurisdiction based on their reasoning that Kinder Morgan was performing work "usually performed by the operator of a coal mine by undertaking the

activities to make the coal suitable for a particular use or to meet market specifications." 23 FMSHRC 1288, 1294 (2001).

The respondent cites several additional Court opinions that it believes make it clear that storing, loading, and mixing coal are themselves insufficient to support jurisdiction, and that otherwise, anyone who handles coal would be covered by the Act. The respondent concludes that the storing, loading, and mixing must be part of a mine's operations. In support of its argument, the respondent cites Herman v. Associated Elec. Coop. Inc., 172 F. 3d 1078 (8th Cir. 1999), stating "not all businesses that perform tasks listed under the 'work of preparing coal' in Section 802(i) can be considered mines." Id. At 1082, and that while utilities may be subject to the Act if they maintain a presence at the mine and assist in mining or loading the coal or if they engage in coal preparation of the type performed by mine operators, "a utility that receives processed coal from a mine does not itself become a 'mine' by further processing the coal for combustion." Id. At 1083. Thus, once a producer delivers processed, marketable coal to a utility, the jurisdiction of MSHA ends, even though the utility may do further blending of the product. Id.

The respondent argues that the Fourth Circuit made this same point in United Energy Services, Inc. v. MSHA, 35 F. 3d 971 (4th Cir. 1994), involving the operator of a power plant that went onto mine property and loaded coal refuse from a pile and transported it to the plant. Id at 973. Employing a functional analysis, the Fourth Circuit found that the plant operator was engaged in the work of preparing the coal. Id. At 975. The respondent asserts that the Court was careful to rule, however, that the same analysis would not apply once the coal was delivered to the plant.

The respondent asserts that the following facts are not contradicted:

1. Dominion purchases coal from various producers.
2. The coal is delivered to the Power Fuels site by contract truckers for the producers.
3. Dominion owns all of the coal that is delivered to the site.
4. Power Fuels is a contractor for Dominion under a Terminalling Agreement.
5. Power Fuels weighs, samples and stores the coal for Dominion.
6. Dominion instructs Power Fuels how to blend and deliver the coal.
7. Dominion does so to achieve the desired burn for the fuel going into its plant.
8. Dominion is the sole consumer of the coal at the Power Fuels site.
9. If Power Fuels did not store and blend the coal for Dominion, Dominion would have to do the work itself or find another contractor to do it.
10. The work performed by Power Fuels is work that is usually performed by utilities or other consumers of coal. It is not the type of work performed by producers or brokers of coal.

The respondent concludes that the activities listed in 30 U.S.C. Section 802(i) as being part of the "work of preparing the coal" are limited by the phrase "as is usually done by the operator of the coal mine." If the storing, loading, and mining is the type of work usually performed by the mine operator, the work is subject to the Act. On the other hand, if the work is not of that type, but is work of the type usually performed by a utility or other consumer of the coal, the work is not subject to the Act. In this regard, the respondent asserts that MSHA's Special Investigator Robert Clay testified that the activities in question occurred on the property of Dominion, MSHA would not have considered the to be within its jurisdiction. In other words, if Dominion had done the work itself, the agency would not have asserted jurisdiction. The respondent concludes that if the activities are not subject to the Act when performed by Dominion, then they are not subject to the Act when performed by a contractor for Dominion, and that any other interpretation would lead to the extreme and unreasonable position that MSHA has jurisdiction over everyone who receives and handles coal.

Findings and Conclusions

Jurisdiction

The essence and focus of the respondent's jurisdictional argument is the statutory language defining a coal mine, and the meaning of the phrases "work of preparing the coal" , and "such other work of preparing such coal as is usually done by the operator of the coal mine". At hearing, the respondent's counsel argued that any work associated with the blending, mixing, and storage of coal does not ipso facto constitute "work of preparing the coal", and does not necessarily result in MSHA jurisdiction (Tr. 133-134).

The respondent maintains that "a line must be drawn", particularly in view of the statutory language requiring a showing that the kind of work performed is the kind that is usually done by a coal mine operator (Tr. 133-134). In support of its argument, the respondent relies on the dissenting judge (now Supreme Court Justice Alioto) in RNS Services, Inc., supra that not every mining, washing, sizing, or trucking of coal is a coal mine, and that the kind of work must be the kind done by the coal operator.

The respondent dismisses any suggestion that the work it performs is done for a customer, or that it was "some kind of a middle man custom blending coal to sell into a market", and asserts that it is in fact a contractor for the Dominion Power Plant that is not its customer "in a sales sense" (Tr. 137). In response to these arguments, the Secretary maintains that the case law cited and relied on in this case to support MSHA jurisdiction is clear that the line is drawn where the work of mixing, storage, and loading of coal is done to meet a customer's specifications (Tr. 135).

I reject the respondent's claim that Dominion Power is not its customer. The terminalling agreement specifically describes Dominion Power as a "customer" numerous times at pages one through eight (Ex. G-4). Further, the respondent's site manager Walter Crickmer in describing the blending of coal at the site pursuant to the agreement stated this is done "in accordance with the reasonable requirements of the customers" (Tr. 127). He also confirmed that the site is "a custom blending facility for Dominion Power", and that all work performed "is done to meet the requirements and specifications" of Dominion Power (Tr. 128). Accordingly, I conclude and find that Dominion Power is in fact the respondent's customer.

The respondent's assertion that Inspector Clay, at (Tr. 69-72), testified that in the event the trucks he observed were delivering coal directly to Dominion's power plant, MSHA would not have asserted jurisdiction must be considered in context. In fact, Mr. Clay testified that he had "no idea" because he does not inspect power company property unless MSHA jurisdiction is factually determined, and that was his understanding that MSHA's claim of site jurisdiction is based on the working activities he only observed taking place at the respondent's property (Tr. 69-70). Further, when asked if he would be present at the hearing in this case if he had observed the trucks going directly into the plant, inspector Clay stated he probably would be present at the hearing because MSHA's assistant district manager, his superior, "asked me to look into it and I reported to him what I found" (Tr. 73). Further, in response to whether MSHA has asserted its jurisdiction over other power plants in District 5, he confirmed that the only power plant he was asked to look at was Dominion's plant jurisdiction there" (Tr. 73).

The respondent's conclusion that in my Consolidation Coal case, I found the layer loading of coal at the loading dock at that facility location that includes a fixed barge constituted "work in preparing coal" to meet customer specifications is correct. However, the respondent's assertion that I found that "a barge on which the coal was loaded" was a "facility" not subject to MSHA jurisdiction because "it simply transported the coal is incorrect and mis-leading. I made no finding the barge was a "facility". The barge in issue was an empty barge on the Ohio River located away from the loading dock location where no layer loading was taking place.

I take particular note of the Court majority in RNS Services, Inc. supra, rejecting the dissenting opinion that the Commission applied a per se ruling in that case. Indeed, the Court noted that the Commission was cognizant of the fact that coal refuse was loaded at the site in question for delivery to its power generator facility and correctly applied a "functional analysis" test in determining that the coal loaded and store at that site was in fact loaded at a place regularly used for that purpose, and were sufficient to render the sites of these activities a "mine".

I conclude and find that the resolution of jurisdiction in this case is properly and reasonably made pursuant to a "functional analysis" as described in RNS Services, Inc., and Oliver M. Elam, as well as in Mineral Coal Sales, Inc., Marion Docks, Inc., and Kinder Morgan Operating Supra, decisions that I find persuasive and controlling precedents in this case.

Although the Court decisions in Herman v. Associated Elec. Coop., Inc. and United Energy Services, Inc. v. FMSHRC, supra, relied on by the respondent may support its argument that mixing, storage, and loading of coal work are not per se operational indicators supporting Mine Act jurisdiction, those cases dealt with consumer electrical power plant sites, and not sites similar to those at the respondent's facility. In Herman, the Court found its operations to be "manufacturing" subject to OSHA jurisdiction. In United Energy Services, Inc., the Court applied a functional analysis in concluding that a power plant operator that went on mine property and loaded refuse from a pile and transported it to its plant was engaged in coal preparation work that is subject to Mine Act jurisdiction.

I am not persuaded by the respondent's arguments that the work it performs for Dominion Power is work that is usually performed by utilities or other coal consumers, and is not the type of work performed by coal producers or brokers. The respondent is not a power plant, utility, consumer, or a coal producer or broker, and the fact that it does not engage in those activities is not relevant in this case. The credible evidence and un-rebutted facts in this case clearly establishes that the respondent is a stand-alone coal blending facility identified as such by signs prominently displayed on its property. The site location includes mobile equipment such as several trucks, end-loaders, an office, a bath house, sampling and weight scales, clearly identified storage areas, and a water tank and trucks, all of which provide the logistical support for the employees as they perform their assigned duties related to the receipt, testing, weighing, blending, mixing, storage, and transportation of coal from that site in order to meet the coal specifications that are communicated to the respondent by Dominion Power on a daily continual basis.

I am not further persuaded by the respondent's argument that if it did not store and blend the coal for Dominion, Dominion would have to do the work itself or find another contractor to do it. In this case, no entity other than the respondent is the subject of MSHA's asserted jurisdiction and I assume it operates under a mine ID number assigned by MSHA to a mine operator pursuant to 30 C.F.R., Part 41. In any event, pursuant to Section 3(d) of the Mine Act, the definition of an "operator" includes any contractor performing services at a mine. Further, I find that the respondent cannot avoid the Secretary's enforcement scrutiny because it is contractually obligated to perform these services for Dominion Power.

Although the respondent's site manager, Walter Crickmer, testified that no sizing, screening, or crushing activities take place at the site and has "never done anything to improve the coal quality", he nonetheless admitted that the site does in fact blend the coal together on a daily basis using its end-loaders that mix and blend it "by one bucket of this, and two buckets of that", following the aforementioned detailed specifications as to how the coal should be blended. Contrary to Mr. Crickmer's opinion that the work performed at the site has nothing to do with the quality of the coal it processes, I find the credible evidence with respect to the testing, blending, and re-blending as necessary, are directly accomplished in order to insure and maintain the consistent quality of the coal pursuant to Dominion's quality specifications.

I conclude and find that the working activities taking place at the respondent's site, namely, the mixing, blending, weighing, sampling, storing, loading, and transporting coal to Dominion's plant clearly meets the Mine Act definition of "work of preparing the coal", and that this work is clearly done to meet the specifications of its customer, Dominion Power. I further conclude and find that the respondent's custom coal blending facility is a "coal or other mine" clearly within the statutory definitions found in the Mine Act, and is therefore subject to the Mine Act and the Secretary's enforcement jurisdiction. The respondent's arguments to the contrary ARE REJECTED.

The Alleged Violations

In support of the citations in issue, the Secretary relies on the testimony of MSHA Inspector Thomas Bower that I find credible and un-rebutted. The respondent availed itself of the opportunity to cross-examine the inspector, but focused primarily on questions related to jurisdiction rather than facts related to the conditions or practices that prompted the inspector to issue the citations with his findings noted on the face of the citations. The respondent presented no credible evidence to rebut the Secretary's position with respect to the facts associated to the violations in issue. In this regard, I informed the parties that I expected to hear testimony concerning the three alleged violations, as well as the jurisdictional issue. I further informed the parties that I did not intend to come back to try the three citations and the respondent clearly understood that this was the case (Tr. 19-20). Further, my hearing notice informed the parties that the issues to be addressed included testimony related to the violations.

The respondent's statement at page two of its post-hearing brief that I permitted the parties to file briefs "on the issue of jurisdiction" suggests that I limited any briefing to that issue alone is incorrect. My expectation of briefs was not limited to jurisdictional issues, with the exclusion of any arguments related to the alleged violations. At the conclusion of the hearing, the respondent stated that briefs would be helpful (Tr. 140).

Further, when asked if the respondent wished to discuss the violations, the counsel stated "no sir" and "we rest" (Tr. 138). Although the respondent could have called the foreman who received the citations to testify, it did not do so. During opening statements, the respondent stated "We think the citations are relevant on the jurisdictional issues" (Tr. 19). The Secretary stated his intention to initially establish jurisdiction and then proceed to each of the citations (Tr. 20).

The Secretary's assertions at page 13 of his post-hearing brief that "The facts of the alleged violations at issue in these proceedings are not in dispute", citing ALJ Exhibit 1, and the trial transcript at pages 6 and 17 are inaccurate. ALJ Exhibit 1 concerns a joint stipulation with respect to the admission of the citations in issue into evidence "without objection, except to jurisdiction". Each of the citations is described by the citation number, the date of issue, and the cited mandatory safety standard. I find nothing to suggest that the parties agreed that the factual conditions or practices described by the inspector on the face of each of the citations were not in dispute or otherwise agreed to by the parties.

At page 6 of the transcript, I commented that the principal issue concerned jurisdiction, and acknowledged the pre-trial position statement filed by the Secretary on November 15, 2013, with a copy furnished to the respondent. The Secretary's statement includes the intention to call the inspectors who testified in this case, with the expectation of eliciting testimony including the factual basis for the issuance of the citations. At page 3 of the statement, the Secretary acknowledged that the issues to be litigated also included gravity, negligence, and the proposed civil penalty assessments. The Secretary's reference to page 17 of the transcript reflects a comment by the Secretary's counsel stating "and as Mr. Massie said, the facts really aren't in dispute". I also note a statement by counsel at transcript page 11 that "there are going to be disputes about the facts . . . There will be differences about what the facts mean".

Based on all of the aforementioned circumstances, any suggestion that the respondent was not expected to address the fact of violations at the hearing, or was somehow misled, prejudiced, or treated unfairly for not doing so IS REJECTED. I conclude and find that the respondent has waived its right and opportunity to present a defense or to rebut the Secretary's evidence in support of the violations. I further find that the credible and unrebutted testimony of Inspector Bower establishes that the conditions and practices described in the citations constitute violations of the cited mandatory safety standards. Accordingly, the citations ARE AFFIRMED.

History of Prior Violations

Exhibit A to the Secretary's petition for assessment of civil penalties reflects no prior or repeat violations, and no further information was received from the Secretary. Absent any evidence to the contrary, I find the respondent has a good compliance record.

Good Faith Compliance

Based on the timely corrective actions as reflected in the citation termination notices, I find that the respondent abated all of the violations in good faith.

Negligence

Based on the inspector's credible testimony that the respondent's foreman was not responsible for any maintenance of the trucks delivering coal to the site, I accept and adopt his "low negligence" determinations with respect to each of the citations.

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

The Secretary characterized the respondent as a small mine operator (Tr. 139), and the parties stipulated that the payment of the proposed civil penalty assessments for the citations will not adversely affect the respondent's ability to continue in business. I adopt and incorporate these agreements as my findings.

Gravity

Inspector Bower confirmed that he was not aware of any difficulties encountered by the cited trucks inbound to the site, and to his knowledge they arrived safely (Tr. 51). While this may be true, the fact remains that his un-rebutted and credible testimony clearly supports the cited truck brake conditions and defective backup alarm. Accordingly, I find that the violations were serious and would reasonably likely result in injuries.

Significant and Substantial Determinations

Inspector Bower determined that all of the citations were significant and substantial (S & S) violations. With respect to Citation No. 820074, he testified that the cited truck braking defects that he characterized as "faulty brakes, resulted in a 25% loss of breaking power". He confirmed that the conditions exposed employees who regularly traveled the site roads to injuries, and that employees operating equipment were reasonably likely to suffer broken bones

or disabling and traumatic injuries in the event of an accident. He conceded this was "a worst case" scenario and lesser injuries were conceivable (Tr. 30-36).

The inspector cited another truck after determining the brakes were out of adjustment and that a leaking and defective air value resulted in a loss of braking air pressure that would reasonably likely result in an accident. He stated that a "runaway truck" could result in a collision accident resulting in permanently disabling injuries. (Citation No 8204726; Tr. 39-40)

The inspector cited the same truck after it was observed operating in reverse in congested working areas where employees were present and the back-alarm did not sound. He confirmed that the vehicle had an obstructed view to the rear, and that if it backed up over people working in the area, they would be exposed to crushing and permanently disabling injuries (Citation No. 8204725; Tr. 33-34).

The established case precedents with respect to S & S violations, Cement Div. Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981), Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984), and U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985), and U.S. Steel Mining Co., Inc., 6 FMSHRC 1574 (July 1984), require proof of the following elements that must be considered in terms of continued mining operations:

> 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.

I conclude and find that the affirmance of the violations establishes the first Mathies prong. With respect to the second prong requiring a discrete safety hazard contributed to by the violation, I conclude and find that the credible unrebutted testimony of Inspector Bower describing the defective truck braking systems, as well as the cited inoperative trucks backup alarm, presented discrete safety hazards and measures of danger contributed to by the violations pursuant to the second Mathies prong.

The third Mathies prong requires the presence of a reasonable likelihood that the hazard contributed to will result in an injury. The evaluation of the risk of injury necessarily assumes the continuance of normal mining operations. The credible and unrebutted testimony of the inspectors establishes that 30 to 50 loaded trucks arrived and entered the respondent's site on a daily basis with frequent stops at the weighing scale, the storage areas where the coal is dumped and blended by end-loaders. The trucks also traveled over inclined roadways on the property and the same roads used by the work force on foot.

Inspector Bower testified credibly that the trucks backed up in congested areas where workers and pieces of equipment are present, and that the cited facility brake conditions could prevent the truck from stopping as intended or result in a truck "runaway". Based on the brake defects that he found, as well as his accident investigator experience involving truck accidents under similar defective braking systems, he concluded that it was reasonably likely that an accident would occur causing a wreck, with the resulting serious injuries that he described. One of these trucks was also cited for an inoperative backup alarm and the inspector concluded that if it backed over anyone, they would likely suffer crushing and disabling injuries.

I conclude and find that the hazardous defective truck brakes and backup alarm conditions would reasonably likely contribute to an accident resulting in serious injuries to employees at risk in the event they were to continue with their normal working duties. Accordingly, I conclude and find that the third and fourth Mathies prongs have also been established. Accordingly, all of the inspector's S & S determinations ARE AFFIRMED.

ORDER

Based on all of the aforementioned findings and conclusions in this case, including the civil penalty assessment criteria found in Section 110(i) of the Mine Act, all of the citations ARE AFFIRMED. Further, I accept and affirm the proposed penalty assessments of $100 for each of the citations (8204724, 8204725, and 8204726).

The respondent shall pay a civil penalty assessment of $300 for the violations within thirty (30) days of the date of this Order. Payment shall be submitted to the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390, referencing the captioned docket numbers. Upon receipt of payment, these proceedings ARE DISMISSED.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

Anthony D. Jones, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor, Arlington, VA 22209-2296

Wade W. Massie, Penn, Stuart, & Eskridge, P.O. Box 2288, Abingdon, VA 24212