

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

May 12, 1999

JIM WALTER RESOURCES, INCORPORATED,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. SE 99-6-R
v.	:	Citation No. 7665505; 9/23/98
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. SE 99-7-R
	:	Citation No. 7665506; 9/23/98
	:	
Respondent	:	Docket No. SE 99-8-R
	:	Citation No. 7665507; 9/23/98
	:	
	:	Docket No. SE 99-9-R
	:	Citation No. 7665512; 9/24/98
	:	
	:	Docket No. SE 99-10-R
	:	Citation No. 7665512; 9/24/98
	:	
	:	Central Supply Shop
	:	Mine ID 01-02515
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	
Petitioner	:	Docket No. SE 99-66
v.	:	A.C. No. 01-02515-03521
	:	
	:	Central Shop
JIM WALTER RESOURCES INCORPORATED,	:	
	:	
Respondent	:	

**SUMMARY DECISION**

Before: Judge Feldman

These contest proceedings are before me for summary disposition based on the parties' joint stipulations of material facts that serve as the basis for their motions for summary decision. These matters concern whether Jim Walter Resources Inc.'s (JWR's) Central Machine Shop (Central Shop) and/or Central Supply Shop (Central Supply) are "mines" subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Section 3(h) of the Act defines "coal or other mine" as follows:

(1) “[C]oal or other mine” means . . . (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 in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, **or, the work of preparing coal or other minerals** and includes custom coal preparation facilities. (Emphasis added).

Simply stated, JWR’s Central Shop and Central Supply are not located within any specific mine boundary. Rather, they are located in the vicinity of, and support, JWR’s mining operations at its Nos. 3, 4, 5 and 7 Mines. Central Shop provides maintenance and repair services to the machinery used at the JWR mines and its preparation plants. Central Supply furnishes mining tools, equipment, and major necessities to the JWR mines such as rock dust, line curtains and hammers and nails. Additionally, Central Supply serves as the primary source of parts, tools and other equipment used at Central Shop. Central Shop has been inspected by the Mine Safety and Health Administration (MSHA) since 1982. Prior to the September 1998 issuance of the subject contested citations, MSHA has not claimed or otherwise exercised jurisdiction over Central Supply.

JWR stipulates that it will not contest the fact of occurrence of the subject citations in the event it is determined that Central Shop and/or Central Supply is subject to Mine Act jurisdiction. For the reasons discussed below, consistent with the Commission’s basic jurisdictional framework set forth in *Secretary of Labor v. Elam*, 4 FMSHRC 5, 7 (January 1982),<sup>1</sup> it is concluded that Central Shop, but not Central Supply, is subject to Mine Act jurisdiction. Accordingly, the eight non-significant and substantial (non-S&S) citations in civil penalty Docket No. SE 99-66 shall be affirmed. Also consistent with this decision, JWR’s contests in Docket Nos. SE 99-6-R through SE 99-10-R shall be granted resulting in the dismissal of these contest proceedings.

## **I. JOINT STIPULATION OF FACTS**

1. Jim Walter Resources, Inc. (JWR) is an Alabama corporation that is engaged in the business of coal production. JWR owns and operates four underground

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<sup>1</sup> As discussed *infra*, *Elam* requires an inquiry into whether the predicate operations alleged by the Secretary to be “used in, or resulting from, the work of extracting” coal, are operations usually performed by the operator of a coal mine. Section 3(h) of the Act; 4 FMSHRC at 7.

coal mines within the state of Alabama. Those mines are the No. 3 mine in Jefferson County and the Nos. 4, 5, and 7 mines located in Tuscaloosa County. JWR owns and operates a preparation plant at each of their four mines.

2. JWR owns and operates a Central Shop and a Central Supply, located adjacent to one another on JWR property, in Tuscaloosa County. The Central Shop/Supply are located within approximately one mile of the No. 5 mine, within twenty-five miles of the No. 3 mine and within six miles of the Nos. 4 and 7 mines.

3. JWR also owns and operates a Training Center and a Central Mining Office in the same vicinity. Neither of these facilities has ever been inspected by MSHA.

a. Central Shop

4. MSHA's inspection reports indicate that the Central Shop has been inspected since November 16, 1982. Since that time, the following actions have been performed by JWR regarding the Central Shop:

(a) Pursuant to 30 C.F.R. § 41.11, JWR notified the Mine Safety and Health Administration (MSHA) of the legal identity of the operator of the Central Shop. Accordingly, the Central Shop was issued Federal Mine Identification Number 01-02515.

(b) JWR has complied with the requirement to notify MSHA of any changes to the legal identity report for the Central Shop as required by 30 C.F.R. § 41.20.

(c) MSHA has conducted inspections of the Central Shop at least once each year as identified in Exhibit "A" attached hereto.

(d) MSHA has also conducted the following at the Central Shop: noise technical investigation, respirable dust technical inspection, electrical investigation, code-a-phone spot inspection, and Section 103(g) spot inspections.

(e) The Central Shop has complied with 30 C.F.R. § 50.20 by preparing and submitting MSHA Report Form 7000-1 with respect to the reporting of accidents, injuries, and illnesses.

(f) The Central Shop has complied with 30 C.F.R. § 50.30 by preparing and submitting MSHA Report Form 7000-2 with respect to the quarterly reporting of employment and coal production.

(g) During the period of November 1, 1982 through November 10, 1998, JWR has paid 43 violations that were issued by MSHA as a result of inspections made at the Central Shop.

5. The Central Shop's function is to provide repair services and to maintain electrical and mechanical equipment used throughout JWR operations. The majority of the work activities involve the repair, rebuild, modification, or overhaul of various types of mining equipment. Typical jobs include the rebuilding of longwall stageloaders, continuous mining machines, ram cars, scoops, versa tracs, roof bolting machines, man buses, locomotives, electrical starter boxes, overhauling longwall shields and fabricating chutes and hoppers for the preparation plant.

6. The workers at the Central Shop are hourly workers employed by JWR and are members of the United Mine Workers of America (UMWA). They are supervised by management employees. The Shop operates two shifts (formally three shifts until 9/98) per day, five days per week and occasionally performs work on Saturdays and Sundays, if the need arises. Presently, the Central Shop employs 9 salary workers and 54 hourly workers. The salaried employees of the Central Shop are not members of the UMWA. The salaried personnel of the Central Shop consist of a shop manager, coordinator, master mechanic, four shop foremen, a maintenance clerk/secretary and an accountant who also serves as the accountanty for Central Supply.

7. The equipment that is repaired at the shop is transported to and from the shop by JWR employees using JWR vehicles. The equipment that is brought to the shop is identified with a particular JWR mine or other facility and all charges for materials and labor are attributed to that particular mine or other facility by the Central Shop.

8. The Central Shop provides its services to only JWR mines and facilities.

b. Central Supply

9. (a) Prior to the instant action, the Central Supply has never been inspected by MSHA.

(b) The Central Supply does not have a Federal Mine Identification Number as required by 30 C.F.R. § 41.11.

10. The primary function of the Central Supply is to serve as a warehouse of goods, materials and supplies that are used in or to be used in JWR's mines, preparation plants and the Central Shop.

11. The nature of supplies maintained at the Central Supply range from conveyor belts and belt structures to hard hats and safety glasses to automobile oil filters and nails. The majority of the inventoried goods at the Central Supply are used or intended to be used in support of JWR's mining operations. A complete list of inventoried items is attached hereto as Exhibit "B".

12. The Central Supply does not sell to the public.

13. The value of the inventoried goods at the Central Supply is approximately \$12 million.

14. Approximately \$7 million of the goods is considered on "consignment" while the remaining \$5 million constitutes materials/supplies purchased outright by JWR.

15. Over 90% of the value of inventoried goods at the Central Supply are ultimately used in JWR's mining operations. This figure represents approximately 80% of the entire stock of inventoried goods.

16. JWR has agreements with approximately 70 vendors who place goods on "consignment" at the Central Supply. These consigned goods are intended to be used by JWR's mining operations, at which time JWR compensates the vendor for the goods. In the event the vendor has a need for the consigned goods while still in inventory, the vendor retains the right to retrieve the goods from JWR's Central Supply. Such a retrieval of consigned goods by a vendor is not a normal, everyday occurrence.

17. The delivery of materials and supplies from the Central Supply to the mines is accomplished by Central Supply employees transporting the goods in a JWR owned vehicle. The Supply has a one ton flat bed truck that is used for most deliveries. The drivers are required to have a commercial driver's license.

18. Employment at the Central Supply consists of 16 salaried and 7 hourly personnel. The 7 hourly employees are members of the UMWA. The salaried employees of the Central Supply are not members of the UMWA. The sixteen salaried personnel of the Supply consist of the general manager of purchasing and materials control, assistant manager of materials control, assistant manager of purchasing, materials disposition coordinator, warranty claims manager, buyer, assistant buyer, purchasing assistant, assistant storekeeper/purchasing, assistant store supervisor motor program, assistant supervisor of evening shift, four materials control analysts and an accountant who also serves as the accountant for the Central Shop. The Central Supply is open 24 hours per day, 7 days per week.

The regular work week is Monday through Saturday with the Sunday shifts being staffed through “on call” personnel.

19. JWR agrees that, should there be a decision conferring MSHA’s jurisdiction over the Central Shop and/or the Central Supply, JWR will pay the proposed assessments set forth in the Civil Penalty Proceeding, SE 99-66, and will withdraw its related Contest Proceedings, Docket Numbers SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R.

## **II. FINDINGS OF FACT AND CONCLUSIONS**

### **a. Definition of “coal or other mine”**

Section 4 of the Mine Act provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, “coal or other mine” includes “lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, . . . the work of preparing coal . . . .” 30 U.S.C. § 802(h)(1). Included in the definition of “coal mine” in section 3(h)(2) of the Act, 30 U.S.C. § 802(h)(2), are “machinery, tools [and] equipment . . . placed upon, under, or above the surface of such [mine].” Section 3(i) of the Act defines “work of preparing coal” to include such other mining related work that “is **usually done** by the operator of a coal mine. 30 U.S.C. § 802(i). (Emphasis added).

These matters concern the question of statutory interpretation of the jurisdictional predicates in section 3 of the Mine Act. The definitions of “coal mine” and “work of preparing coal” in sections 3(h) and 3(i) are “broad [,]” “sweeping” and “expansive[,]” *Marshall v. Stouidt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 93(3d Cir. 1979), *cert. denied*, 444 U.S. C 1015 (1980). The first inquiry in statutory construction is whether the statutory provision is clear and unambiguous and “whether Congress has directly spoken to the precise question in issue.” *Chevron U.S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (referred to as the “*Chevron I*” analysis). Congress intended that “doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). Thus, Mine Act coverage is to be given the “broadest possible” scope, *Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm’n*, 969 F.2 1501, 1503 (3d. Cir. 1992),

in that the statute “was intended to provide a ‘sweeping definition’ of the word ‘mine,’ encompassing much more than the usual meaning attributed to it.” *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932 936 (6<sup>th</sup> Cir. 1997) (*quoting* *Donovan v. Carolina Stalite Co.*, 236 U.S. App. D.C. 264, 734 F.2d 1547, 1551 (D.C. Cir. 1984)).

Although Congress has articulated that the statutory definitions of “coal mine” and “work of preparing coal” should be broadly applied, the issue of whether a broad range of activities beyond traditional mining is covered by section 3(h) of the Act has been the subject of frequent litigation with conflicting results. For example, Courts have disagreed over whether a power plant that crushes and screens coal is subject to the Act. *See, e.g., Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm’n*, 969 F.2d 1501, 1503 (3<sup>rd</sup> Cir. 1992) (sizing and cleaning coal by power plant constitutes coal preparation under section 3(h) of the Act); *cf. Secretary of Labor v. Associated Electric Cooperative, Inc.*, CA 8 No. 98-1876, \_\_\_ F.3d \_\_\_ (April 20, 1999, 8<sup>th</sup> Cir.) (coal handling and crushing by power plant more properly characterized as “manufacturing” than “mining”).

Given the ambiguous nature of the applicability of section 3(h) of the Act, the analysis shifts to whether the Secretary’s interpretation of section 3(h) of the Act is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project v. Dole*, 899 F.2d 1127, 1131 (D.C. Cir. 1989) (referred to as the “*Chevron II*” analysis). The Mine Act is a statute designed to ensure safe working conditions for miners. Therefore, an analysis of the proper jurisdictional reach of section 3(h) requires consideration of whether the subject activities involve substantial coal processing operations that expose workers to the unique hazards associated with mining. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997).

#### b. The Central Machine Shop

While there are numerous cases that apply the Mine Act’s broad jurisdictional mandate to a variety of activities associated with the preparation of coal, the specific question of whether a central off-mine site maintenance facility is subject to Mine Act jurisdiction is not a matter of first impression. In *U.S. Steel Mining, Inc.*, 10 FMSHRC 146 (February 1988), in virtually identical circumstances to the facts of this case, the Commission considered the jurisdictional question concerning a central repair shop that: (1) was used for the repair and maintenance of electrical and mechanical coal mining equipment; (2) had an MSHA ID number and was previously subject to MSHA enforcement; and (3) was located between ½ mile and 5 miles from two of U.S. Steel’s mines and its processing plant. The Commission concluded U.S. Steel’s maintenance facility was, in and of “itself,” “. . . a separate surface ‘coal mine’ within the meaning of [section 3(h)(1)] of the Act . . . .” *Id.* at 148. In determining the repair activities were subject to Mine Act regulation, the Commission noted that U.S. Steel employees were exposed to hazards inherent in moving heavy equipment, performing electrical work, and engaging in various grinding, cutting, sharpening and welding tasks. *Id.* at 147; *see also W. J. Bokus Industries, Inc.*, 16 FMSHRC 704,708 (April 1994) (equipment in a maintenance and storage garage could injure miners working in the garage).

In its Motion for Summary Decision, JWR’s seeks to distance itself from *U.S. Steel*. For reasons that are not entirely clear, JWR argues the *U.S. Steel* holding only imposed Mine Act jurisdiction on equipment rather than the repair shop itself. (*See JWR Motion*, subsection (B)(3)(r)). However, *U.S. Steel* makes no such distinction. Moreover, it is a mine facility, not the equipment therein, that is the predicate for Mine Act jurisdiction. In this regard, as a general

proposition, a haulage truck ceases to be subject to Mine Act jurisdiction once it exits mine property. Thus, *U.S. Steel* is the controlling case law that supports MSHA's exercise of jurisdiction over JWR's Central Shop.

Notwithstanding *U.S. Steel*, the jurisdictional framework for conferring Mine Act jurisdiction involves an analysis of whether the particular coal-processing operation sought to be regulated as "mining" is in the nature of activities "usually" performed by mine operators engaged in the extraction of minerals. *Secretary of Labor v. Elam*, 4 FMSHRC at 7; 30 U.S.C. § 820(i). As discussed above, the hazards associated with activities closely related to mining are the activities Congress intended to regulate under the Mine Act's statutory scheme.

The maintenance of mining equipment is an integral part of the mining process, and proper maintenance is the means to achieve a fundamental Mine Act purpose -- continued operation of safe equipment. The maintenance function, if performed improperly, could pose a hazard to miners working on mine property as well as Central Shop employees. Accordingly, the Secretary's Motion for Summary Decision of the Central Shop jurisdictional question in Docket No. SE 99-66 shall be granted. Consequently, consistent with JWR's stipulation, JWR has agreed to pay the \$440.00 civil penalty proposed by the Secretary for the eight non-S&S citations that are the subject of Docket No. SE 99-66.

### c. The Central Supply Shop

The significant facts that provide the basis for jurisdiction of the Central Shop are absent with respect to the Central Supply. Although the Central Shop was registered as a mine facility and actively inspected by MSHA since 1982, MSHA previously has not sought to exercise jurisdiction over Central Supply despite its location adjacent to the Central Shop. While MSHA is not estopped from asserting its jurisdiction at the present time, less deference must be accorded to MSHA's statutory interpretation of section 3(h) of the Act in view of its inconsistent enforcement history with regard to the Central Shop as compared with Central Supply. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976) (less judicial deference required when agency has taken inconsistent positions in promulgating interpretative regulations).

Moreover, as noted above, while Congress intended the Mine Act's coverage to be broad in scope, the remedial nature of the Mine Act is not without its limitations. *Carolina Stalite*, 734 F.2d at 1551. Although the term "miner" has been broadly applied to include a construction worker, elevator mechanic, laboratory technician or clerk-typist working at a mine, it is only the performance of such wide ranging activities on mine property that confers "miner" status under the Act.<sup>2</sup> *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990); *Martha Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491 (April 1988). For example, in *National Industrial Sand Ass'n v. Marshall*, 601 F.2d 689, 704 (3<sup>rd</sup> Cir. 1979), in determining whether one

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<sup>2</sup> Section 3(g) of the Act defines "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).



is a miner, the Court stated that “the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities.” (Emphasis in original). *See also, Cyprus Empire Corporation*, 15 FMSHRC 10, 14 (January 1993). Thus, the Court has concluded that a manufacturer of mining equipment, that sends sales representatives onto mine property in connection with the sale of its products, is an independent contractor-operator subject to jurisdiction of the Mine Act. *Joy Technologies Inc. v. Secretary of Labor*, 99 F.3d 991 (10<sup>th</sup> Cir. 1996).

However, because a variety of activities performed on mine property may give rise to Mine Act jurisdiction, such activities may not provide jurisdiction if performed off mine site property. *Dilip K. Paul v. P.B. - K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (November 1985) (a mine engineering office located off mine property is not “a coal or other mine”). Although Central Supply is a facility engaging in vendor activities similar to those in *Joy Technologies*, Central Supply’s activities occur outside mine property. To hold that Central Supply is a “coal or other mine” subject to the Mine Act conceivably could subject all vendors of mining equipment and supplies to mine regulation, a result never contemplated by Congress.

In the final analysis, individuals employed by a mine operator performing sales and supply activities outside mine property are not “miners” in need of Mine Act protection. Put another way, mining equipment sales and supply functions, are, by their nature, usually performed by vendors and warehouse personnel who are not exposed to hazards normally associated with mining. Such activities performed off mine property, whether performed by employees of a mine operator, or by independent vendors and suppliers, cannot be classified as “mining” under the Commission’s *Elam* test.

In this regard, three of the five contested citations issued at Central Supply involve technical violations concerning failure to allow MSHA inspections and a reporting violation. The remaining two citations concern non-significant and substantial violations with respect to a forklift. Citation No. 7665508 contested in these matters states, “[t]his forklift is used to move supplies and material within the confines of the main supply building.” The transfer of supplies and materials within the confines of a central supply warehouse are not activities normally performed by the operator of a mine. Accordingly, the Secretary has failed to demonstrate the Central Supply Shop is “a coal or other mine” as contemplated by Congress under section 3(h) of the Mine Act. Consequently, JWR’s Motion for Summary Decision with respect to its Central Supply shall be granted and the captioned contest proceedings shall be dismissed.

### **ORDER**

In view of the above, **IT IS ORDERED** that Jim Walter Resources Inc., pay, within 40 days of the date of this Decision, a civil penalty of \$440.00 in satisfaction of the eight citations that are subject of Docket No. SE 99-66. Upon timely receipt of payment, Docket No. SE 99-66 **IS DISMISSED**.

**IT IS FURTHER ORDERED** that Jim Walter Resources Inc.'s contests in Docket Nos. SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R **ARE GRANTED**. Accordingly, the subject citations in these contest proceedings **ARE VACATED**, and Docket Nos. SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R **ARE DISMISSED**.

Jerold Feldman  
Administrative Law Judge

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