

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 29, 2004

HOBET MINING COMPANY, INC.,	:	CONTEST PROCEEDINGS
dba DAL-TEX DIV.	:	
Contestant	:	Docket No. WEVA 2004-64-R
	:	Citation No. 7205693; 01/13/2004
	:	
v.	:	Docket No. WEVA 2004-65-R
	:	Citation No. 7205696; 01/13/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2004-66-R
MINE SAFETY AND HEALTH	:	Citation No. 7214788; 01/08/2004
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 2004-67-R
	:	Citation No. 7214789; 01/08/2004
	:	
	:	Docket No. WEVA 2004-68-R
	:	Order No. 7224622; 01/13/2004
	:	
	:	Docket No. WEVA 2004-69-R
	:	Citation No. 7224624; 01/13/2004
	:	
	:	Docket No. WEVA 2004-70-R
	:	Order No. 7224625; 01/13/2004
	:	
	:	Docket No. WEVA 2004-71-R
	:	Order No. 7224626; 01/13/2004
	:	
	:	Peats Branch No. 3
	:	Mine ID 46-06740
	:	
HOBET MINING COMPANY INC.	:	Docket No. WEVA 2004-72-R
Contestant	:	Order No. 7224627; 01/13/2004
	:	
	:	Docket No. WEVA 2004-73-R
v.	:	Order No. 724628; 01/13/2004
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2004-74-R
MINE SAFETY AND HEALTH	:	Citation No. 7205692; 1/13/2004
ADMINISTRATION, (MSHA),	:	
Respondent	:	Docket No. WEVA 2004-75-R
	:	Citation No. 7205694; 1/13/2004

: Docket No. WEVA 2004-76-R
: Citation No. 7214786; 1/8/2004
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: Docket No. WEVA 2004-77-R
: Citation No. 7214787; 1/8/2004
:
: Docket No. WEVA 2004-78-R
: Citation No. 7214790; 1/13/2004
:
: Monclo Prep Plant
: Mine ID 46-03138

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania,
for the Contestant;
Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Respondent.

Before: Judge Feldman

These consolidated contest proceedings arise from citations issued by the Department of Labor's Mine Safety and Health Administration (MSHA) to Hobet Mining Company, Inc., d/b/a Dal-Tex Div. (Hobet) pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (Mine Act or Act). Hobet is a subsidiary of Arch Minerals (Arch Coal or Arch). These proceedings concern citations issued at an abandoned coal preparation facility and an adjoining former mountain-top mine site. The citations were issued at the Monclo Preparation Plant (Monclo) and the adjacent Peats Branch No. 3 mine property (Peats Branch) on January 8 and January 13, 2004. The citations were issued after MSHA resumed inspecting the sites in December 2003 following a fatality of a contractor employee that occurred at Peats Branch on November 14, 2003. The contested citations primarily concern alleged record keeping violations. The citations are not related to the fatal accident.

A hearing limited to the issue of Mine Act jurisdiction was conducted in Charleston, West Virginia on June 3 and June 4, 2004. The judge, Hobet counsel R. Henry Moore, and the Secretary's counsel Karen Barefield, traveled to Monclo and Peats Branch for on-site observations during the evening of June 3, 2004. Also present during the on-site visit were MSHA inspector Sherman L. Slaughter, James F. Johnson who is Arch Coal's manager of inactive and idled properties, and Dale F. Lucha who is Arch's manager of human resources. (June 4, 2004, Tr. 6-12). The record was left open for the deposition of MSHA inspector Bobby Moreland. Moreland was deposed on July 26, 2004. The parties' post-hearing briefs and replies are of record.

I. Statement of the Case

The Monclo plant and Peats Branch are adjacent sites located in Sharples West Virginia, that are owned by Hobet Mining Company. These properties are known as the “Dal-Tex complex.” The Monclo and Peats Branch sites are located next to a 1,500 acre property known as the Bumbo Number 2 Mine (Bumbo), which is also owned by Hobet. The Bumbo property eventually will be mined, although there are no current on-site mining activities.

Monclo ceased processing coal in October 1999 and reclamation activities at Peats Branch were completed in June 2000. Hobet’s contests are based on its assertion that MSHA no longer has jurisdiction over the subject sites because Monclo is abandoned and will be demolished, and because Peats Branch has been restored to its original contours. Both Monclo and Peats Branch contain structures that are no longer used in coal preparation or mining. These contest matters present the question of the jurisdictional significance of these structures at an abandoned coal preparation facility and a reclaimed mountain-top mine site. As discussed below, the Secretary has failed to demonstrate that the subject sites currently are governed by the Mine Act. Consequently, the contested citations shall be vacated.

II. Findings of Fact

A. Monclo Plant

Prior to October 1, 1999, the Monclo Preparation Plant was operated by Arch Coal. Monclo is currently owned by Arch’s subsidiary Hobet, d/b/a Dal-Tex Division. The prep plant is located on a West Virginia state road before the main gate to the Dal-Tex complex. The prep plant structures consist of the main plant building, its stacker tubes, conveyors and thickening ponds. The Peats Branch mine site is located beyond the gate to the Dal-Tex complex. The coal extracted from Peats Branch was conveyed by truck or conveyor for processing at Monclo. Coal mining at Peats Branch was discontinued in July 1999. Coal preparation and production activities at Monclo ceased on October 1, 1999, and have never resumed.

The railroad tracks that access the public road in front of the Monclo plant are overgrown with weeds. The track is used infrequently by the railroad company for storage of defective railroad cars. The railroad company does not use railroad cars for transportation from the plant.

With the exception of a rear prep plant entrance, all Monclo entrances are welded or bolted shut. Portions of the plant have been disassembled and removed. Namely, the conveyor trusses and belts between the stacking tubes, as well as plant equipment, have been taken away. The plant’s thickeners have vegetation growing in them. Hobet plans to demolish the Monclo buildings and the remaining plant structures in the future.

With the exception of power for lights to illuminate the area for security purposes, power was removed from the preparation plant in June 2001. Although electricity to the plant had been disconnected, there was an energized substation on the Monclo property beyond the main gate to the Dal-Tex complex. The substation was damaged by fire in November 2002. In January 2004, when the subject citations were written, the damaged substation transferred power to a portable substation that provided power to a dragline. The portable substation also powered a maintenance shop, warehouse and pond pump used to house and maintain equipment operated by D&M Construction (D&M), a Hobet contractor that performed maintenance work at the sites. The substation also powered other portable substations connected by 7200 volt cables at various locations at Peats Branch. The damaged substation and portable substations have since been removed.

Monclo also has a refuse impoundment area on its grounds. There are roads leading to the impoundment on the Monclo property. Unlike inspections of Monclo and Peats Branch which were discontinued for several years, MSHA has continued to inspect the impoundment. Hobet is not disputing MSHA's jurisdiction of the impoundment.

In October 1999 Arch requested MSHA to place the Monclo plant in a non-producing status for an indefinite period. In response to Arch's request, MSHA placed Monclo in "BA" status on October 21, 1999. "BA" status denotes a "Non-producing, Persons Working, Active" status. MSHA's Coal General Inspections Handbook (MSHA Handbook) defines "Non-producing, Persons Working, Active" status as:

For surface operations, normal activity is not occurring and coal is not being produced or processed or other material is not being handled or moved. *Mines in this category are required to be inspected* and MSHA sampling is optional depending on the individual circumstances.

(Stip. 19). (Emphasis added).

MSHA modified Monclo from "BA" to "CF" status on July 5, 2000, after Hobet notified MSHA that all of its employees were laid off on June 6, 2000, when reclamation at Peats Branch was completed. (Gov. Ex. 2; Stip. 21). "CF" status denotes "No One Working, Idle/Inactive/Temporarily Idled/Inactive." The MSHA Handbook defines "CF" status, in pertinent part, as:

[T]he work of all miners has been terminated and production related activity has ceased. It is anticipated that this is a temporary condition and that the mine will reopen in the near future. This category includes: . . . (4) mines that are idled and the only activity being conducted is security checks . . . *Mines in this category are not required to be inspected* . . . It is important to determine that no work is being done at a mine before placing the mine in this temporarily idled status. *Mine sites that have active impoundments are still subject to inspection and*

therefore cannot be placed in CF status. While there is no specific time restriction applied to mines in this status, it is necessary to verify what activity is taking place at the mine once each quarter. This may be accomplished by a brief mine visit or other documented contact with the mine operator.

(Stip. 22). (Emphasis added).

Since placing Monclo in non-production status on October 21, 1999, MSHA's only inspection of Monclo prior to the November 2003 fatality occurred on June 28, 2000. The June 28, 2000, inspection preceded MSHA's July 5, 2000, designation of Monclo as an "inactive" mine. No violations were cited during the June 28, 2000, inspection.

With the exception of the June 28, 2000, inspection, from November 1999 through November 2003, MSHA inspections at Monclo were limited to water/slurry technical inspections of the refuse impoundment. Thus, only one inspection of the Monclo plant and its structures was conducted during the approximate 3½ year period preceding the December 2003 inspection that culminated in the issuance of the subject citations.

B. Peats Branch

Peats Branch consists of approximately 5,000 acres. Coal was removed from the mine site via mountain-top mining until July 23, 1999. Reclamation activities by Hobet employees ceased on June 6, 2000, at which time all but one remaining highwall was reclaimed. Hobet contracted with D&M to perform the drainage construction during mining and reclamation. As discussed below, D&M continues to perform maintenance work at the Peats Branch and Monclo sites.

The remaining Peats Branch highwall is approximately 5,500 feet in length. The highwall defines a road that is constructed at the base of the highwall. This road contains remnants of a disassembled belt line. The belt line is being removed so that it can be used at another Arch mine site. Hobet will reach the final stage of bond release when reclamation of the remaining highwall at Peats Branch is complete. Hobet does not intend to reclaim the remaining highwall in the foreseeable future. Reclamation eventually will be accomplished with earthen material removed from the Bumbo property.

In addition to the highwall and remaining belt line, there is a dragline at the Peats Branch site. The dragline is surrounded by a chain link fence with barbed wire. The perimeter of the fence is overgrown with weeds. The dragline bucket has been removed. In short, the dragline had not been in service for several years and could not be returned to service without substantial restoration. The dragline is for sale. Power to the dragline was maintained to keep condensation from forming on the electrical components. As required by Hobet's state permits, D&M employees occasionally enter the dragline to spread saw dust on the floor to absorb and remove oil that leaks from the dragline pulleys and engine.

The roads on the Peats Branch property are used to access the dragline, the remaining belt line, the impoundment and the Bumbo property. In addition, there is a road to a warehouse and truck shop that are used to store and maintain D&M's equipment. As noted, the warehouse and truck shop are energized. These roadways are traveled by D&M personnel.

In correspondence dated June 8, 2000, Hobet notified MSHA that many of its employees at Peats Branch had been laid off after coal production ceased on July 23, 1999. Hobet also notified MSHA that all remaining employees were laid off on June 6, 2000, after reclamation activities had been completed. Consequently, Hobet requested that Peats Branch be placed in "Permanently Abandoned" status. (Gov. Ex. 2).

MSHA's Handbook defines an "abandoned" mine as one in which ". . . the work of all miners has been terminated and production activity has ceased and it is not anticipated that activity will resume in the near future Mines in this category are not required to be inspected or sampled." (Stip. 10). MSHA normally verifies the propriety of designating a mine site as "abandoned."

Prior to the December 2003 inspections that resulted in the contested citations, MSHA conducted its last inspection of Peats Branch on May 26, 2000. From June 2000 until the December 2003 inspections that resulted in the contested citations, MSHA did not conduct any inspections on the Peats Branch property. (Stip. 11).

C. Reclamation Process

The West Virginia Department of Environmental Protection (DEP) monitors reclamation activities at surface mines. Reclamation involves the return and regrading of displaced earth to its original configuration, as well as the re-planting of vegetation. State mining permits authorize the parameters for mining and reclamation activities. In this regard, West Virginia state permit I-634 governs the land use and drainage structures for both the Peats Branch watershed and the Bumbo watershed that eventually end in Beech Creek. Hobet posted a bond to ensure its compliance with state reclamation environmental requirements. The DEP determines when a surface mine has been sufficiently reclaimed to reach grade release, which is the first stage of bond release. The entire bond will be released after the remaining highwall is reclaimed.

D. D&M Construction

All Peats Branch drainage structures must be completed and maintained before Hobet submits the grade release to DEP. D&M is the maintenance contractor at the Peats Branch and Monclo sites. D&M maintains an equipment yard at Peats Branch. The equipment consists of excavators, dozers, dump trucks and a track loader. D&M's excavators and dozers are smaller in scale than the larger earth moving equipment used by Hobet employees during the reclamation process. D&M employs three workers at these sites. These employees maintain roadways and repair ground failures and erosion gullies.

D&M also built and maintains drainage structures such as sediment ponds, sediment ditches, sumps, conveyance ditches and rock channels. A sump is a hole in the ground on the side of a road. The sump allows sediment to settle out before water enters a culvert. A conveyance ditch moves surface water and runoff in a controlled manner to a pond or culvert. The majority of D&M's work is performed with excavators that are used to clean sumps and culverts. D&M also alleviates water flow problems by constructing rock channels with sized rock called "rip-rap" to direct and control runoff.

D&M employs three people at Monclo and Peats Branch. These employees work five days a week and they have been working at Peats Branch since 1990. Following MSHA's designation of the Peats Branch status as "abandoned" in June 2000, D&M continued working at Peats Branch primarily performing maintenance work. The D&M workers were never laid off from the Peats Branch site. As previously noted, MSHA's Handbook requires it to verify once each quarter what activities are occurring at an inactive mine. (Stip. 22).

E. November 14, 2003, Fatal Accident

At approximately 11:45 a.m. on November 14, 2003, a D&M equipment operator attempted to maneuver his Koehring 6633-7 excavator through a wet area at the Peats Branch site in an attempt to access and clean a roadside culvert. The accident occurred when the excavator overturned into a pond trapping the victim in the operator's compartment that had submerged under water. It took several hours for rescue workers to hook a wrecker to a crane to lift the overturned excavator out of the water. The victim died at the scene.

The accident was reported to MSHA's field office in Logan, West Virginia by Dale Lucha. Although he advised MSHA of the accident, Lucha testified that he was not certain that MSHA had jurisdiction.

F. Events Following Accident

Although MSHA last inspected the Monclo and Peats Branch sites in May and June 2000, respectively, MSHA continued to enter the Dal-Tex complex to conduct periodic impoundment inspections. As a consequence of its impoundment inspections, MSHA must have been aware of D&M's maintenance activities as D&M's excavator and dozer equipment is readily visible at the Monclo and Peats Branch sites. Moreover, Lucha testified, without contradiction, that MSHA inspector Dennis Holbrook had been sent to Monclo to observe the condition of a substation shortly after it was damaged by fire in November 2002. At that time, the substation was used to power D&M equipment. Lucha testified that Jake Blevins, a supervisor at the MSHA Logan, West Virginia field office, advised him that MSHA did not have jurisdiction of the substation fire because it was located in an abandoned area.

It wasn't until November 20, 2003, one week following the fatal accident, that MSHA modified the Monclo plant status from "CF" (No One Working, Idle/Inactive/Temporarily Idled/Inactive) back to "BA" (Non-producing, Persons Working, Active). The practical effect of the status change from "CF" to "BA" meant that MSHA inspections of Monclo, that had been discontinued for more than three years, were reinstated.

On December 23 and December 30, 2003, MSHA inspector Bobby Moreland visited the Monclo and Peats Branch sites "on a fact finding mission" to observe on-going activities for the purpose of reporting back to the District Office. (Moreland dep. at p.10). Moreland observed the substation that had been damaged by a fault condition fire a year earlier. As a result of Moreland's observations, on January 13, 2004, MSHA issued five citations and two failure to abate orders at the Monclo plant. The citations and failure to abate orders primarily concerned record keeping violations involving Hobet's alleged failure to maintain information regarding testing and repairing of circuit breakers, its failure to keep workplace examination records, and its failure to maintain information on independent contractors.

Moreland's December 23 and December 30, 2003, fact finding inspections also resulted in four record keeping citations and two failure to abate orders at Peats Branch. These citations concerned Hobet's alleged failure to maintain information regarding testing and repairing of circuit breakers, its failure to keep workplace examination records, and its failure to maintain information on independent contractors. In addition, a citation and 107(a) imminent danger order were issued because the energized dragline on the Peats Branch property was in a state of disrepair with numerous electrical circuits and devices missing. The citation and imminent danger order also noted that security had been breached as a result of an opening in the chain link fence surrounding the dragline.

G. On-Site Observations

The June 3, 2004, on-site observations of the Monclo and adjoining Peats Branch sites were very instructive. The preparation plant was abandoned. The entrances were chained or welded closed. Many of the windows were broken. The area surrounding the plant, including the thickeners, were overgrown with weeds.

Peats Branch is a 5,000 acre site consisting of mountains and valleys for as far as the eye can see. The site is very green with vegetation. The one remaining highwall, 5,500 feet in length, serves to preserve a road that traverses along its base. The road contained a partially dismantled conveyor, most of which had been removed. Putting the size of the remaining 5,500 feet long highwall in perspective, there is approximately one foot of remaining highwall per acre on the Peats Branch site.¹

¹ An acre consists of 43,560 square feet. *Dictionary of Mining, Mineral and Related Terms* 5 (2nd ed. 1997).

The dragline on the Peats Branch property was enclosed by a barbed-wire chain link fence. The dragline appeared rusted and in a state of disrepair. The chain link fence was surrounded by overgrown weeds. The dragline bucket was disconnected and lying in a nearby field. It was also surrounded by weeds.

H. MSHA's Reclamation Enforcement

MSHA's Program Policy Manual does not refer to the issue of jurisdiction of abandoned preparation plants or abandoned surface mines. The Policy Manual also does not address the question of jurisdiction of reclamation of surface mines. (Joint Ex. 1).

MSHA has opined that Mine Act jurisdiction ceases after reclamation activities are completed. In a letter dated February 21, 1979, the Assistant Secretary of Labor for Mine Safety and Health advised the Ohio Mining and Reclamation Association that MSHA "would not exercise jurisdiction" after "all mining and mining related activities have been concluded and the site has been returned basically to its pre[-]mining state." The Assistant Secretary concluded "discing, fertilizing, mulching, seeding and the planting of trees at surface mine sites, after regrading and replacement of topsoil by the mine operators [when] no miners [were] engaged in the reclamation activities," did not give rise to Mine Act jurisdiction. (Joint Ex. 2).

In a Memorandum dated May 24, 1989, the Associate Solicitor advised MSHA's Administrator for Coal Mine Safety and Health that MSHA did not have jurisdiction of "activities more remote from mining" such as reclamation of gob material "after the mine operator had restored the mined land to its original contour." (Joint Ex. 3). The conclusion was based "on the nature of the activities, and the amount of time which [had] elapsed since mining took place on the site." *Id.*

III. Pertinent Statutory Provisions

Section 3(h)(1) of the Act defines what constitutes a "mine." The provision states:

"[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such materials, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience

of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1). (Emphasis added).

Section 4 defines the scope of Mine Act coverage:

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

30 U.S.C. § 803.

Section 103(a) authorizes the Secretary to “make frequent inspections and investigations in coal or other mines each year.” 30 U.S.C. § 813(a). In this regard, *section 103(a) requires the Secretary to “make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface or other mine in its entirety at least two times a year.”* *Id.* (Emphasis added).

IV. Further Findings and Conclusions

As a threshold matter, I note that while the legislative history encourages the broadest possible interpretation in favor of expansive jurisdictional inclusion, in the final analysis, the Mine Act was intended to establish a “single mine safety and health law, applicable *to all mining activity.*” S. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977) (emphasis added); S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977 at 14). The Secretary generally relies on the left over structures at the former prep plant and mine site as a basis for asserting Mine Act jurisdiction. Although she also relies on D&M’s drainage construction during active reclamation, the Secretary has not articulated clearly and concisely what, if any, mining related activities serve as the jurisdictional basis after reclamation was completed and Hobet’s workers were laid off in June 2000. Nevertheless, she argues that her statutory interpretation of section 3(h)(1) is entitled to deference.

It is long settled that “. . . considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, an agency’s statutory interpretive authority is not unfettered. In considering the degree of weight to be accorded an agency’s statutory interpretation, the Supreme Court more recently noted:

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the *degree of the agency's . . . consistency . . . and to the persuasiveness of the agency's position*. See *Skidmore, supra*, at 139-140. The approach has produced a spectrum of judicial responses, from great respect at one end, see *e.g., Aluminum Co. Of America v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) (“substantial deference” to administrative construction), to near indifference at the other, see, *e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988) (interpretation advanced for the first time in a litigation brief). Justice Jackson summed things up in *Skidmore v. Swift & Co.*:

“The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S., at 140

United States v. Mead Corp., 533 U.S. 218, 228 (2001) (footnotes omitted). (Emphasis added).

As discussed below, case law, the Secretary's former pronouncements concerning jurisdiction of reclamation sites, and MSHA's cessation of inspections at Monclo and Peats Branch, conflict with the Secretary's jurisdictional assertion. Consequently, the Secretary has not demonstrated that her proffered application of section 3(h)(1) of the Act to the facts in these proceedings is reasonable.

A leading case addressing the issue of MSHA's jurisdiction over the reclamation of structures at coal preparation plants and mine sites is *Lancashire Coal Company v. Sec'y of Labor*, 968 F.2d 388 (3rd Cir. 1992). In *Lancashire*, MSHA asserted jurisdiction over a silo at a coal preparation facility that it had ceased inspecting and declared “permanently abandoned” in September 1988. *Id.* at 389. MSHA asserted jurisdiction following its investigation of a fatal accident that occurred in March 1989 when the silo collapsed while being demolished killing an employee of the demolition contractor. *Id.*

In *Lancashire*, the Court distinguished Mine Act jurisdiction over structures located in preparation facilities from structures located at mine sites. The Court noted, although section 3(h)(1) of the Act includes structures “resulting from” the work of extracting coal within the definition of a “mine,” section 3(h)(1) only considers structures located at preparation plants to be a “mine” if the structure is “used in, or to be used in,” the work of preparing coal. Thus, the Court, after considering the legislative history, concluded the absence of the words “resulting from” before the words “the work of preparing coal” was dispositive and it rejected the Secretary's claim of Mine Act jurisdiction. *Id.* at 390, 392-93.

Significantly, the Court in *Lancashire* noted:

If Congress does in fact intend *to cover the activity of reclamation of structures* that were once used in the preparation of coal, but are no longer being so used, within the jurisdiction of MSHA rather than the Occupational Safety and Health Administration, it can amend Section 3(h)(1) to add the two missing words.

Id. at 393 (footnote omitted). (Emphasis added).

Herein lies the rub in the Secretary's asserted jurisdiction. Obviously, structures "used in" or "resulting from" mining that are located *at active mine sites* are subject to the Act. However, the thrust of the Secretary's argument is that the presence of such "structures" *at abandoned mine sites*, provides the basis for Mine Act jurisdiction under section 3(h)(1).² This interpretation of section 3(h)(1) is unreasonable because it lacks context. Specifically, the Secretary disregards whether such structures are associated with normal mining or reclamation activities. According to her interpretation, a highwall at an amusement park located at a former mine site would be subject to MSHA regulation. However, as addressed in *Lancashire*, the jurisdictional significance of section 3(h)(1) "structures" no longer used in mining comes into play only when reclamation of such structures is being performed.

The significance of reclamation activity as a prerequisite for jurisdiction is illustrated in a summary decision issued by Judge Weisberger in *R.C. Enterprises*, 1995 WL 20256 (ALJ) (July 17, 1995).³ This case concerned a surface mine that was designated by MSHA as permanently abandoned in February 1993. The mine operator contracted with an individual to perform reclamation activities beginning in June 1993. On September, 22, 1993, the contractor was fatally injured after his dozer tipped on its side at the toe of loose material on a sloped highwall. The reclamation site was reopened by MSHA to an active mine site over the objections of the mine operator.

² The Secretary acknowledges *Lancashire* may preclude jurisdiction over the Monclo structures (the main plant building and its stacker tubes, conveyors and thickeners). However, she relies on the substation as a section 3(h)(1) structure "resulting from" the extraction of coal because it was used to power the dragline. (Sec'y br. at 13). In addition, the Secretary contends the substation is a structure "to be used in" the extraction of coal because it may be used to provide energy for future Bumbo operations. *Id.* The Secretary's argument is unpersuasive in the absence of reclamation activity. With regard to speculated future use, the substation has been dismantled and removed from the Monclo property. (Moreland dep. p.42). The Secretary also argues that she has jurisdiction over Monclo's roadway because it is appurtenant to the impoundment. (Sec'y br. at 12-13). This jurisdictional question goes beyond the scope of these proceedings as the contested citations do not concern roadways.

³ This decision was not reported in the bound volumes of FMSHRC Decisions.

In *R.C. Enterprises*, officials of the MSHA Birmingham Subdistrict Office stipulated that, prior to the September 1993 accident, it had officially expressed the position that reclamation sites were not subject to MSHA's jurisdiction, and, that MSHA had never asserted jurisdiction of reclamation sites in the Birmingham region. Judge Weisberger rejected the mine operator's estoppel argument. Judge Weisberger determined the contractor was a mine operator by virtue of his reclamation activity involving the restoration of a surface coal mine to its original contours. (*Id.* at p.4) (Emphasis added). Thus, it was the performance of reclamation activity that was determinative.

The proposition that reclamation activity normally associated with mining is a prerequisite for jurisdiction at abandoned facilities consistently has been supported by MSHA's earlier pronouncements. In February 1979, MSHA advised the Ohio Mining and Reclamation Association that it would not exercise jurisdiction after all mining related activities had ceased and the site was returned to its pre-mining state. (Joint Ex. 2). In a May 1989 memorandum, the Associate Solicitor addressed the issue of MSHA jurisdiction over reclamation projects and reached a similar conclusion. (Joint Ex. 3). He concluded the jurisdiction of reclamation sites must be resolved based on an evaluation of whether the on-site activities are remote in time and scope from the restoration of "the mined land to its original contour." *Id.* Specifically, the Associate Solicitor provided the following four criteria for determining if reclamation activities are subject to the Mine Act:

- (1) the nature of the activities, particularly in relation to activities normally associated with mining;
- (2) the relationship in time and the geographic proximity of the activities in question to active mining operations;
- (3) the nature of the land at the time of the activities; and
- (4) the operational relationship of the activities to active mining operations, including the control and direction of the workforce and the degree to which equipment or facilities are shared with active mining operations.

Id.

In the current case, Monclo ceased processing coal in October 1999, mining of Peats Branch terminated in July 1999, and reclamation was completed in June 2000. Thus, MSHA is relying on maintenance work performed several years after extraction and preparation activities ceased, and after Peats Branch had been returned to its original contours. Clearly, the D&M activity observed by Moreland in December 2003 is remote in time to active mining operations.

Moreover, D&M's maintenance activities are far removed from the mining process. These activities primarily consist of repairing and grading hillside erosion and maintaining drainage structures such as sediment ponds, sediment ditches and sumps. D&M uses its own small-scale dozers and excavators to perform its maintenance responsibilities. The activities are performed under the direction and supervision of D&M without any active participation by Hobet. Such activities are distinguishable from the reclamation that was accomplished by Hobet employees using Hobet equipment. The fact that D&M's work is required by a state permit does not alter the nature and scope of D&M's environmental maintenance activities. Such activities are not closely related to mining.

The conclusion that MSHA lacks jurisdiction also is supported by MSHA's own actions. Section 103(a) of the Mine Act *requires* MSHA to inspect surface mines and preparation facilities in their entirety twice yearly. Although MSHA has the prosecutorial discretion not to exercise enforcement authority, MSHA lacks the discretion to waive jurisdiction. *Air Prods. and Chems., Inc.*, 15 FMSHRC 2428, 2435 n.2 (December 1993) (concurring opinion).

Yet MSHA did not inspect Monclo and Peats Branch during the 3½ year period from June 2000 until December 2003. It is difficult to imagine that MSHA was unaware of D&M's maintenance activities during this period given MSHA's impoundment inspections and the obvious on-site presence of D&M equipment.⁴ Moreover, MSHA was obliged to periodically verify the continuing absence of mining activity at the sites after they were designated as "idled/inactive" in July 2000. Significantly, MSHA declined to assert jurisdiction after it was summoned to observe the condition of the substation fire in November 2002. D&M's presence should have been readily apparent at that time as the substation was used to energize D&M equipment. It was only after Moreland's "fact-finding" mission that occurred following the fatality in December 2003 that MSHA decided to reassert jurisdiction. However, the evidence fails to demonstrate any change in the nature and scope of D&M's maintenance work since MSHA ceased inspections in June 2000.

I note, parenthetically, that although MSHA's Monclo and Peats Branch enforcement history is relevant, the conclusion that MSHA lacks jurisdiction because D&M's activities are too far removed from the reclamation process is based solely on the facts of this case rather than estoppel. *See King Knob Coal Co.*, 1417, 1421-22 (June 1981) (citations omitted). So too, the Secretary's earlier inconsistent policy statements concerning jurisdiction of reclamation sites are relevant with respect to the issue of the reasonableness of the Secretary's current jurisdictional assertion.

⁴ As previously noted, Hobet has not challenged MSHA's jurisdiction of the impoundment located on Monclo property. Mine Act jurisdiction may exist over one portion of a site and not another. *Air Prods. and Chems., Inc.*, 13 FMSHRC 1657 (ALJ) (October 1991) *aff'd in part rev'd in part* 15 FMSHRC 2428, (December 1993) *aff'd without opinion* 37 F.3d (3rd Cir. 1994).

Finally, this decision should be narrowly construed as it applies only to the jurisdictional question arising out of the citations in issue. This decision does not preclude future Mine Act jurisdiction if circumstances change such as reclamation of the highwall.

ORDER

In the final analysis, in the absence of mining activity, or, activity normally associated with mining such as site restoration to its original topography, the Secretary has failed to demonstrate that the Monclo and/or Peats Branch sites are subject to Mine Act jurisdiction. **ACCORDINGLY**, the contests of Hobet Mining Company, Inc., d/b/a Dal-tex Div., **ARE GRANTED** and the captioned citations and orders **ARE VACATED**.

Jerold Feldman
Administrative Law Judge

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