

CCASE:

MSHA V. OLIVER M. ELAM, JR.

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

January 7, 1982

SECRETARY OF LABOR,	Docket Nos. VINC 78-447-P
MINE SAFETY AND HEALTH	79-12-P
ADMINISTRATION (MSHA),	79-40-P
	79-176-P
v.	79-177-P
	79-231-P
OLIVER M. ELAM, JR., COMPANY	LAKE 79-11
	79-110
	79-281

#### DECISION

This case involves several alleged violations of mandatory standards under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The sole issue before us is whether the facility operated by Oliver M. Elam, Jr., Company ("Elam") is a "mine" subject to the Act. The judge held that it is not. 1/ We affirm.

Elam owns and operates a commercial dock on the Ohio River. It also owns, for the purpose of leasing to others, approximately 50 pieces of construction equipment such as cranes, trucks, and bulldozers. Elam employs eleven persons who work interchangeably at both the dock and equipment rental operation. Usually three employees work at the dock when it is in use. At the dock facility, steel, ingot cars, pipe, tar pitch and coal are loaded onto barges; steel and slag are also unloaded. About 40 percent to 60 percent of the tonnage loaded at the dock is attributable to coal. 2/

Among Elam's customers are some four or five coal brokers who pay Elam to load coal onto barges at the dock. The brokers, who are not mine operators, arrange for delivery of the coal by truck to the dock, and then for delivery by barge to their customers. 3/ Elam's facilities for loading coal consist of a hopper, a crusher, and conveyor belts. The coal is first delivered to and stockpiled on Elam's property. The brokers' employees then weigh the coal and place it in the hopper.

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1/ The judge's decision is reported at 3 FMSHRC 161 (1981).

Elam loaded approximately 300,000 tons of coal onto commercial barges in 1978. During 1979, coal loading dropped to about 1,500 tons ever

six weeks, i.e., approximately 13,500 tons per year.

3/ Elam does not mine coal, nor does it or any of its stockholders or officers own any mineral interest. It has no business arrangements, contracts, or dealings directly with the coal mine operators who initially extract the coal, nor does it have any contractual arrangements with the customers who ultimately accept delivery of the coal off the barges.

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Occasionally, large pieces of coal must be broken by Elam's employees in order to pass through the hopper. From the hopper a conveyor carries the coal to an American Ring crusher where it is broken into essentially one size. The crusher cannot be adjusted for variable sizing and has no grates to sort the crushed coal. Crushing is done because the conveyor belts are covered and cannot always accommodate large pieces of coal; crushing therefore increases the ease of loading, and enables a larger amount of the same to be placed in a given space on the barges. From the crusher another conveyor carries the coal to the barges. Occasionally the crusher is by-passed and coal is loaded directly onto the barges. All coal whether crushed or not is loaded on the barges. Elam does not prepare coal to market specifications or for particular uses, nor does it separate waste from coal or add any material to it. Thus, all of Elam's activities with respect to coal relate solely to loading it for shipment.

Section 4 of the 1977 Mine Act states:

Each coal or other mine, the products of which enter commerce ... shall be subject to the provisions of this Act.

30 U.S.C. § 803. Section 3(h)(1) of the Act defines "coal or other mine" in part as:

(C) lands, ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in, or resulting from ... the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1)(C). The question in this case is whether Elam's loading operation constitutes the "work of preparing the coal", and, therefore, is a "mine." Section 3(i) of the Act provides:

"[W]ork of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine.

30 U.S.C. § 802(i).

The legislative history of the 1977 Mine Act indicates that a broad interpretation is to be applied to the Act's expansive definition of a mine. S.Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted

in Senate Subcommittee on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602. See also *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

While we acknowledge the inclusive nature of the coverage of the Act, we do not find Elam's activities to be covered.

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The 1977 Mine Act's definition of coal preparation was taken unchanged from section 3(i) of the 1969 Coal Act, 30 U.S.C. § 802(i) (1976). The 1969 Coal Act's definition, in turn, was updated from the 1952 Coal Act. The 1952 Act in part provided:

The term 'mine' means an area of land including everything annexed to it by nature and all structures, machinery, tools, equipment and other property, real or personal, placed upon, under or above its surface by man, used in the work of extracting bituminous coal, lignite or anthracite, from its natural deposits in the earth in such area and in the work of processing the coal so extracted. The term 'mine' does not include any strip mine.

The term 'work of processing the coal' as used in this paragraph means the sizing, cleaning, drying, mixing and crushing of bituminous coal, lignite or anthracite, and such other work of processing such coal as is usually done by the operator, and does not mean crushing, coking, or distillation of such coal or such other work of processing such coal as is usually done by a consumer or others in connection with the utilization of such coal

30 U.S.C. § 471(a)(7) (repealed 1969) (emphasis added).

In the 1969 Coal Act's definition of coal preparation the word "preparing" replaced "processing", and the qualifying phrase "and does not mean crushing, coking, or distillation of such coal or such other work of processing such coal as is usually done by a consumer ..." was deleted. The phrase "and includes custom coal preparation facilities" was added to the definition of coal mine, and "breaking" "washing", "storing", and "loading" were added to the definition of the work preparing coal.

Although the legislative history of the 1969 Coal Act sheds no light on the reasons for the 1969 Act's modification of the 1952 Act's definition, 4/ we find it significant that the types of activities comprising "the work of preparing the coal" have consistently been categorized as "work ... usually done by the operator." Thus, inherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the

operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities. In Elam's operations, simply because it in some manner handles coal does not mean that it automatically is a "mine" subject to the Act.

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4/ Of the many bills introduced at the time the 1969 Coal Act was being considered, two retained the language of the 1952 Coal Act pertaining to processing done by consumers and others in connection with the use of coal. The other bills substituted the language that eventually was included in the 1969 Coal Act. No explanation for the differing versions is provided in the legislative history. In any event, we do not read the relevant language of either version to differ substantively, nor, apparently, does the Secretary. Brief at 11.

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Rather, as used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications. 5/ In the present case, although Elam performs several of the functions included in the 1977 Act's definition of coal preparation (i. e., storing, breaking, crushing, and loading), it does so solely to facilitate its loading business and not to meet customers' specifications nor to render the coal fit for any particular use. We therefore conclude that Elam's facility is not a "mine" subject to the coverage of the 1977 Mine Act. Accordingly, the decision of the administrative law judge is affirmed.

Rosemary M.  
Collyer, Chairman  
Richard V. Backley,  
Commissioner  
Frank F. Jestrab,  
Commissioner  
A. E. Lawson,  
Commissioner

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5/ See, e.g., the following descriptions of coal preparation: Purpose of coal preparation is to increase the value of fuel by making it more suitable for uses of the consumer. This is done by: (a) screening or sizing; (b) mixing or blending; (c) cleaning. By combining any 2 or all of these methods, coal can be prepared to standard specifications. A preparation plant should produce clean coal, and refuse free of saleable coal.

R. Peele, ed., Mining Engineers' Handbook, Vol. II, at 35-02 (3rd ed. 1941). Also:

coal preparation. a. A collective term for physical and mechanical processes applied to coal to make it suitable for a particular use.

preparation. a. Treatment of ore or coal to reject waste....

b. The process of preparing run-of-mine coal to meet market specifications by washing and sizing.

Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 226, 859 (1968).

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