CCASE:
MSHA V. CAROLINA STALITE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 29, 1982

SECRETARY OF LABOR, Docket Nos.	BARB 79-319-PM
MINE SAFETY AND HEALTH	SE 79-56-M
ADMINISTRATION (MSHA)	79-91-M
	79-92-M
v.	79-93-M
	79-94-M
CAROLINA STALITE COMPANY	79-95-M
	79-85-M
	79-87-M
	79-114-M
	80-35-M
	80-37-M
	80-44-M

DECISION

This civil penalty case is brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979). On review Carolina Stalite Company (Carolina Stalite) contests the judge's finding that it is a mine subject to the 1977 Mine Act, his failure to suppress evidence, and his conclusion that a citation can be issued if an operator refuses entry to an inspector to conduct an inspection. 1/ For the reasons set forth below, we hold that Carolina Stalite's facility is not a "mine" subject to the Mine Act. 2/ We therefore reverse the judge's decision.

The essential facts are undisputed. Carolina Stalite produces a light weight construction material, "stalite," from slate gravel. It purchases the slate from an adjacent quarry. The quarry is owned and operated by an independent entity, Young Stone Company (Young Stone). There is no corporate affiliation between Carolina Stalite and Young Stone, and no business relationship other than that of vendor and purchaser. Young Stone mines, crushes and delivers on its conveyor belts three-quarter inch slate gravel to Carolina Stalite's premises. Carolina Stalite stores the stone. It then heats the slate gravel in rotary kilns to approximately 2,000 degrees fahrenheit. The heat processing transforms the

1/ These findings were made in an April 14, 1980, order denying Stalite's suppression motion. The final decision on the merits of the citations was issued on December 2, 1980. The decision incorporated

the April 14 order and is reported at 2 FMSHRC 3509 (1981).
2/ In light of our conclusion, we need not address the other issues raised in this proceeding.
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stone into a lightweight material by "bloating" or increasing its volume. 3/ Carolina Stalite subsequently crushes, sizes to specification, and sells the material to manufacturers who use it primarily to produce light-weight masonry blocks. We previously have a knowledged that a "broad interpretation is to be applied to the Act s expansive definition of a mine." Oliver M. Elam, Jr., Co., _____FMSHRC____ (VINC 78-447-P, etc., January 7, 1982). The inclusive nature of the Act's coverage, however, is not without bounds. In this case, we conclude that Carolina Stalite's operations do not fall within the Mine Act's coverage.

The Act classifies as mining, and therefore subjects to its coverage, the extraction, milling and preparation of minerals. 4/ Young Stone, rather than Carolina Stalite, is the entity engaged in the actual extraction of the slate. Therefore, Carolina Stalite is not engaged in "mining" in its classic sense. Young Stone also crushes the slate that it extracts. Although the question is not presented here, such crushing performed incident to extraction would appear to comprise "milling", and therefore "mining", under the Act. 5/ Again, however, Young Stone rather than Carolina Stalite, performs this operation.

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3/ "Bloating" is the practice of "[e]xpanding raw materials such as clays, shale, perlite, slates, etc., by rapid heating to produce a lightweight vesicular structure." U.S. Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms 186 (1968).

4/ The Act does not further define the terms "milling of minerals" or "work of preparing ... minerals." Facially, these appear distinct bases for jurisdiction. Conversely, "milling" and "preparation" can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined minerals for market. This interpretation might better reflect the understanding of these terms within the mining industry. A Dictionary of Mining, Mineral and Related Terms (U.S. Bureau of Mines, 1968) at 707, defines milling as including "preparation for market." Indeed, it is easy to see how both words--milling and preparation--became part of the 1977 Mine Act without connoting entirely separate processes. The Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. $ 721 et seq. (1976) (repealed 1977), spoke only in terms of "milling" in its definition of a mine, presumably because "milling" was the common word used to describe the entire process of preparing non-coal minerals for market. In contrast, the 1969 Coal Act spoke only in terms of "coal

preparation," again presumably because this was the common language used to describe the processing of coal. Thus, we believe the 1977 Mine Act's use of both terms signals that an expansive reading is to be given to mineral processes covered by the Mine Act, rather than requiring a clear distinction between what is a milling or a preparation process.

5/ The 1966 Metal-Nonmetallic Act covered mineral "milling". The term was not further defined in the statute, but the Senate Committee stated that the term "mine" was meant to "extend[] beyond mining in the narrow and ordinary sense of the term. to the next sequential stage to that of the related milling operation." S. Rep. No. 1296, 89th Cong. 2d Sess., reprinted in 1966 U.S. Code Cong. and Ad. News 2846, 2851.

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Carolina Stalite's contact with the mineral at issue occurs only after Young Stone has extracted, crushed, sold and delivered the slate. It is then that Carolina Stalite subjects the slate to its heat processing treatment. We find Carolina's treatment of the mineral to be a manufacturing process that results in a product, rather than a "milling" process under the Mine Act. The crushing and sizing of the "stalite" that occurs after the heat processing is completed are simply final steps in the manufacture of the product. As we did in Oliver Elam, we reject the notion that Congress intended to subject to pervasive regulation of the Mine Act every business that in some manner handles minerals.

We have examined the MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (1979), and the MESA-OSHA Memorandum of Understanding, 39 Fed. Reg. 27382 (1974). They provide no assistance in the resolution of this case. These documents merely reflect the views of the agencies as to their respective jurisdiction. Simply because the agencies may agree between themselves as to which agency will inspect a particular business establishment does not insulate their determination from judicial review. MSHA's authority to regulate a workplace is determined by the scope of the Mine Act's coverage, not by its agreement with OSHA. To the extent that the agreements are intended to provide guidance as to which statute will be enforced in a particular situation, they are sorely deficient. They are replete with exceptions, provisos, and internal inconsistencies. For example, the agreements' definition of "milling" provides that "the essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." In the present case, no separation of constituents occurs, yet MSHA claims jurisdiction.

We note that section 3(h)(1) of the Mine Act, regarding the Secretary of Labor's determination as to what constitutes mineral

milling, does not come into play. That provision allows the Secretary to determine which of his agencies will conduct inspections in cases of dual or overlapping jurisdiction. Conf. Rep. at 38; 1977 Act Leg. Hist at 1316. That situation is not presented here.

Accordingly, the decision of the administrative law judge is reversed, the citations and orders vacated, and the petitions for assessment of civil penalties dismissed.

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Commissioner Lawson dissenting:

A mine is defined by our statute, not by whether the operation performed is "'mining' in its classic sense", and the determination by the judge below that Carolina Stalite is a mine is clearly supported by the express terms of the statute. That determination is buttressed by the legislative history of the Act, judicial precedent, the Secretary of Labor's recognition of the parameters of the Act, and the record evidence.

The statute provides:

Sec. 3. For the purpose of this Act, the term--

(h)(1) ',coal 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 tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. 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. (Emphasis added).

The legislative history of the Act is also pertinent and instructive. As the report of the Senate Committee on Human

Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and
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> it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. (Emphasis added).

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977 at 14; Legislative History of the Federal Mine Safety and Health Act, Committee Print at 602.

Additionally, during the Senate floor debate Senator Kennedy elicited from the Chairman of the Human Resources Committee, Senator Williams, confirmation that, in granting the Secretary full jurisdiction and authority to discharge his obligations, the Act covers "... any property or equipment whatsoever connected with or in proximity to mines." (Emphasis added). Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 997 (1978).

Similarly, the Conference Report commented that coverage extends to all "... surface facilities used in preparing or processing the minerals." (Emphasis added). Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess., 38 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1316.

It would therefore appear clear that Congress intended comprehensive regulation, and the inclusion under the 1977 Act as mines of facilities other than those operated by the particular mine operator actually engaged in extracting the coal or other minerals from the earth. Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert denied, 444 U.S. 1015 (1980). This recognizes the obviously complex and diverse nature of the mining industry, the various facilities existing and required, especially by those operators without their own preparation facilities, and the nature of mineral processing, which often takes place in several stages, depending upon the contemplated use and the degree of processing required for a particular mineral.

The majority examines in some detail the MSHA/OSHA Interagency Agreement and MESA-OSHA Memorandum of Understanding which conclude that separation is an essential step in determining whether an operator is milling. 1/ This contention would make the purity of the mineral in its natural state the measure of MSHA jurisdiction. Such a

limitation has no statutory foundation. Separation, a term not employed by the statute, cannot therefore be construed as a necessary element of milling, but merely as illustrative of one milling practice. In the mining industry, the steps necessary to process a given mineral are dependent upon the unique characteristics of the particular substance.

1/ The majority finds however, that these agreements, despite this eclectic analysis, "provide(s) no assistance in the resolution of this case."

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While the usual mill in a metal mine will separate contaminants from the mined mineral, such separation is often unnecessary in nonmetal mines. A Dictionary of Mining, Mineral, and Related Terms (U.S. Bureau of Mines, 1968), at page 707, defines "milling" as "the grinding or crushing of ore." Additionally, "the term may include the operation of removing valueless or harmful constituents and preparation for market." Id. at 707. "Processing" is defined as "the methods employed to clean, process, and prepare ... ores into the final marketable product." Id. at 866. Appellant would thus appear to be engaged in both milling and processing.

The Secretary has consistently interpreted "crushing", "sizing" and "heat expansion" activities such as those carried on at the Stalite mill as within the scope of the Mine Act. The Secretary's interpretation of the statute he is charged with administering is entitled to special weight under Commission precedent. Secretary of Labor v. Helen Mining Co., 1 FMSHRC 1796 (1979), rev. on other grounds, Nos. 79-2537, 79-2518 (D.C. Cir., February 23, 1982). In addition, although the majority correctly notes that the MSHA-OSHA Interagency Agreement, April 17, 1979, (44 FR 22.827) is not dispositive of the issue before us, that agreement does state that:

"Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briqueting." (Emphasis added).

and is, at least to that limited extent, of interpretive assistance.

The Secretary of Labor also has the responsibility for determining whether the Assistant Secretary of Labor for MSHA, or for OSHA, shall have "... all authority with respect to the health and safety of miners." Sec. 3(h)(1), supra. In any event, our jurisdictional concern is answered by the statute and the Interagency Agreement is one aid in its interpretation.

Finally, the precedents of those Courts which have interpreted the

Act provide assistance.
In Marshall v. Stoudt's Ferry Preparation Company, supra, the court held that Stoudt's preparation plant, which processed material dredged from a river bed and separated such into sand, gravel, and a "usable" anthracite refuse," was a "mine" as defined by the Act. Stoudt s purchased this dredged material from the mine operator who extracted it from the river bed, and transported it both by front-end loader, and, as here, by conveyor belt, to Stoudt's plant where processing was had and the sand, gravel and anthracite refuse thereafter sold. That court, citing the legislative history quoted above, held that:
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"We agree with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine' to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it--the word means what the statute says it means.
Moreover, the record also establishes that the company processes and sells the sand and gravel it separates from the material dredged from the river. We are persuaded, as was the district judge, that in these circumstances, the sand and gravel operation of the company also subjects it to the jurisdiction of the Act as a mineral preparation facility. (Emphasis added)(602 F.2d at 592.)"
See also Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission et al., 664 F.2d 1116 (9th Cir. 1981); Harman Mining Corp. v. FMSHRC, No. 81-1189 (C.A. 4 1981) (unpublished); and Marshall v. Tacoma Fuel Co., Inc., No. 77-0104-B, (W.D. Va. 1981)(Unpublished).
There is no dispute as to the essential facts in this case. Carolina Stalite receives the slate, partially crushed into gravel form, directly by conveyor belt from the immediately adjacent quarry owned and operated by Young. Stalite then stores this slate until, without further preparation it heats the crushed slate in rotary kilns to approximately 2,000 Fahrenheit. As a result of that heating, the volume of the slate is increased.
Heat processing or "bloating" is generally recognized as a common method of processing several different minerals. See Mineral Facts and Problems, (1975 edition, Bureau of Mines) at 256 and 785. The

MSHA-OSHA Agreement (supra) also includes "heat expansion' as a category of milling processes, and its definition precisely parallels Stalite's heating or bloating operation:

"Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume."

The widespread use of the heat expansion process for several minerals, coupled with the broad definition of mining, leads to the conclusion that Stalite is engaged in the work of milling or preparing minerals as a mine.

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After this heat expansion preparation, Stalite crushes the now bloated slate, and sizes it to the specifications required by its customers. It then sells the slate ("stalite") 2/) which is used by Stalite's customers to manufacture lightweight concrete masonry blocks.

The related process of coal preparation is also defined in section 3(i) of the Mine Act as including crushing and sizing activities; see Chapter 27, "Mineral Processing" of 2 SME Mining Engineering Handbook (Cummings and Given Ed., 1973) at 27.5-1, 5-2 which lists and discusses crushing as a milling process. This lends additional support to the finding of the judge below that Stalite was subject to jurisdiction under the Act, since the crushing and sizing were performed to upgrade the product, and upgrading is an important component of a milling preparation process. (Cf. Oliver Elam Jr. Co., 4 FMSHRC 5 (1982), where crushing was solely performed for convenience in loading.) 3/

Stalite further contends that its crushing merely takes place as a final step in its manufacturing process and is not the type of crushing associated with a milling preparation process. Stalite's subsequent crushing of the slate, however, is not "milling", and therefore not "mining", according to the majority. While Stalite does not perform the primary crushing of the slate, minerals are often crushed more than once during the milling process, and such secondary crushing as was done here by Stalite, is a common process.

Much emphasis is also placed by the majority on Stalite's status as an "independent entity" with "no corporate affiliation" or "business relationship other than vendor or purchaser" between Young and Stalite. If Stalite's operations were performed by Young on the latter's property, there would be no question that the crushing, sizing and heating or bloating of the slate would constitute mining. Young's crushing of the slate "... would appear to comprise "milling", and therefore "mining", under the Act" according to the majority. But

no reason is given by the majority, nor does any appear obvious, why the change in ownership of slate, and the location of the secondary crushing operation on the adjacent property of Stalite to which the slate is transported by conveyor belt, converts this operation from mining to manufacturing. A change in ownership of the mineral does not nullify the application or jurisdiction of the Act, nor does the majority cite any statutory justification for such a distinction, nor why, because Young rather than Stalite

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2/ "Stalite" is an unregistered trade name used by appellant.

3/ In the Elam decision the Commission affirmed the judge's finding that a commercial dock facility was not a mine under the Act. In that instance, roughly half of Elam's operations did not involve mineral handling, and the work performed was the breaking and crushing, on some occasions, of coal by Elam, solely for its own convenience in loading the coal onto barges for shipment. Elam did not prepare coal for customers, nor to their market specifications or particular uses, nor did it separate waste from or add any material thereto.

is the corporate entity engaged in the actual extraction of the slate. Stalite is therefore not subject to the Mine Act. However, as the legislative history of the Act, an (e.g.) Stoudt's Ferry, (supra) confirm, whether or not extraction is being performed by the operator is not determinative of whether the operation is a "mine" within the meaning of the Act. As the Stoudt's court found, the mineral processing was there, too, being performed by a party other than the extracting operator. Stoudt's, the processor of the minerals it purchased, was nevertheless found to be a mine operator, and its processing mining under the Act.

The majority further errs in finding Stalite's treatment of the slate to be the "final steps" in the manufacture of the product. As is undisputed, the appellant's "stalite" is thereafter manufactured into lightweight concrete masonry blocks by Stalite's customers. The conclusory rationale of the majority that Congress did not intend to "... subject to pervasive regulation of the Mine Act every business that in some manner handles minerals" does not address the issue presented. Rather, the crushing, sizing, and heating of the slate constitutes milling and fits precisely into the definition of a mine set forth in section 3(h) of the Act. We are not free to reject these statutorily mandated criteria, nor to conclude, absent statutory support, that Stalite's operations are outside the coverage of the Mine Act. That conclusion is unsupported by the statute, the legislative history, any judicial precedent or the facts.

I would therefore affirm the holding of the judge below, and dissent from the majority's opinion herein.

A.E. Lawson,
Commissioner
4/ Although the majority because of its holding does not reach the denial of entry issue in this case, it is clear that this contention of Stalite is without merit under our precedents and those of all courts which have considered this issue, including the U.S. Supreme Court. Donovan v. Dewey, 101 S. Ct. 2534 (1981).
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