CCASE:
MSHA V. ALEXANDER BROTHERS
DDATE:
19820405
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 5, 1982
SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. HOPE 79-221-P

ALEXANDER BROTHERS, INC.

DECISION

This case involves the interpretation of sections 3(h) and 3(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976)(amended 1977). The question is whether, at the time of the alleged violations at issue, Alexander Brothers, Inc., was subject to the 1969 Coal Act. We affirm the administrative law judge's finding of coverage. 1/

Alexander Brothers' operation is located near the site of an abandoned underground mine that was operated from the 1930s to 1967, first by Pond Creek Coal Company and later by Island Creek Coal Company. Waste from the underground mine was deposited on the side of a hill and formed a refuse pile. 2/ After Island Creek sealed the mine, Whitco and Recco Coal Corporation leased the property where the refuse pile is located from its owner, Henry Warden, and reclaimed coal from the pile. In late 1972 or early 1973, that corporation sold its equipment to Alexander Brothers, which also acquired rights to the lease between Warden and Whitco and Recco Coal.

Alexander Brothers' reclamation activities are performed by four to seven employees, and take place at two plants about a mile apart. An end-loader removes material from the refuse pile and deposits it into trucks. The trucks bring the material to the screening plant and dump it into a bin. From the bin, the material goes through a roller and screen that removes large rocks. The material passes under a magnet that removes scrap metal. From there it crosses a vibrating screen where fine coal is sifted and workers pick out rock and obvious waste. The material is then sent through a hammer mill and crushed. It is stockpiled until loaded for transportation to the cleaning plant.

1/ The judge's decision is reported at 3 FMSHRC 2085 (1981).

2/ The refuse pile is composed of coarse and fine coal, rock dust, garbage, rock, timber, wood, steel, dirt, tin cans, bottles, metal and

general debris. At the time of the hearing in January, 1981, it was estimated that about 20 to 25 percent of the material taken from the refuse pile was coal.

~542

At the cleaning plant the material is loaded into a bin and fed onto a conveyor belt. The belt transports it to a tank where it is mixed with water. The material next passes through a jig which separates coal and coal-bearing material from non-coal. 3/ From the jig, fine and coarse coal are handled separately. The fine material, i.e., 1/8 inch size particles or smaller, goes to a cyclone that removes the remaining non-coal, and then goes to a dryer. 4/ The larger pieces are crushed to one inch size particles and carried to a heavy media washer, which controls the ash content. 5/ (Any fine coal resulting from this crushing also goes to a cyclone.) From the heavy media washer the coarse coal is taken to the dryer. The fine and coarse coal are then remixed and loaded onto railroad cars for shipment. The coal is sold to a broker, and the parties stipulated that it enters interstate commerce.

The administrative law judge examined the procedures undertaken by Alexander Brothers. He noted that Alexander Brothers' facility differs from "traditional preparation facilities" in that the raw material processed at these facilities is run-of-mine coal and thus contains a much higher percentage of coal than the material processed by Alexander Brothers. 3 FMSHRC at 2091. The judge found that, due to this difference in the composition of the materials processed, Alexander Brothers employs some separation techniques not used at traditional facilities. He found, however, that both types of operations involve "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. The judge noted that section 3(i) of the Coal Act defined "work of preparing the coal" as including these very processes. He concluded that Alexander Brothers engages in the "work of preparing the coal" as defined in section 3(i). 3 FMSHRC at 2093.

In addition, the judge held that a coal preparation facility need not extract coal or have a direct relationship with the extractor in order to be covered by the Coal Act. 3 FMSHRC at 2092-93. The judge

---

3/ A jig is defined as:

a. A device which separates coal from foreign matter by means of their difference in specific gravity in a water medium.

Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral, and Related Terms 600 (1968)(hereafter "Dictionary of Mining").

4/ A cyclone cleans coal with the aid of centrifugal force:

cyclone washer. Cyclone washing of small coal ... is
effected with the aid of centrifugal force. The heavier
shale particles move to the wall of the cyclone and are
eventually discharged at the bottom while the lighter coal
particles are swept towards the central vortex and are
discharged through an outlet at the top. The washer may be
used for cleaning coal up to three-fourths of an inch....
Dictionary of Mining at 297.
5/ A heavy media washer is a machine that cleans coal by means of a
sink-float process that separates coal from other minerals through
immersion in a magnetite suspension. See "dense-media separation" and
"heavy-media separation", Dictionary of Mining at 311, 536.
~543
therefore concluded that Alexander Brothers was subject to the
coverage of the Coal Act. He did not resolve the question of whether
Alexander Brothers was a "custom coal preparation facility" under
section 3(h). 3 FMSHRC at 2097. 6/ Finally, he rejected Alexander
Brothers' argument that the definition of "coal mine" contained in
section 3(h) of the Coal Act was unconstitutionally vague. Id.
Alexander Brothers argues that it was not subject to the Coal Act
because it has no connection with any coal extractor. This argument
is premised largely on a memorandum issued March 31, 1972, by the
Mining Enforcement and Safety Administration, commonly referred to as
the Geisler memorandum. This memorandum was rescinded on October 8,
1976. 7/ The Geisler memorandum indicated that a preparation facility
would not be considered a mine under the Coal Act unless it were
directly connected to the extractor of the coal it prepared.
Alexander Brothers argues that the Geisler memorandum represents "a
clear, concise and logical analysis of the intent of Congress with
respect to the scope of the definition of a coal mine under the 1969
Coal Act." Alexander Brothers submits that the Commission should
reject the rationale of the 1976 memorandum rescinding the Geisler
memorandum because it improperly extends the jurisdiction of the Coal
Act.
Our resolution of the question before us is governed by the
statute, rather than by which of two conflicting interpretations by
the Solicitor is correct. Resolution of questions of statutory
interpretation is a primary role of the Commission. Helen Mining Co.,
1 FMSHRC 1796, 1781, rev'd on other grounds sub nom., UMWA v. FMSHRC,
No. 79-2503, etc., (D.C. Cir. Feb. 23, 1982). Thus, we will examine
the facts in this case against the relevant statutory provisions.
The term "coal mine" was defined in section 3(h) of the 1969 Coal
Act as follows:
"coal mine" means an area of land and all structures,
facilities, machinery, tools, equipment, shafts, slopes,

tunnels, excavations, and other property, real or personal,
placed upon, under, or above the surface of such land by any
person, used in, or to be used in, or resulting from,

6/ In view of our conclusion that Alexander Brothers was subject to the Coal Act because it engaged in coal preparation, we also do not resolve this issue. In addition, the judge suggested that the Act. would cover Alexander Brothers' operation simply because it was performed on an area of land "resulting from" the work of extracting coal from its natural deposits. It is also unnecessary for us to address this alternate basis of coverage.

7/ The Geisler memorandum was an internal Department of Interior memo from the assistant solicitor for regulations and procedures to the director of the Bureau of Mines. The assistant solicitor responded to an inquiry on whether Geisler Coal Sales, and similar independent preparation facilities, were subject to the 1969 Coal Act. The 1976 memorandum was also from the Interior Department's Office of the Solicitor, and was addressed to the administrator for MESA. It reviewed the Geisler memorandum.

the work of extracting in such area bituminous coal,
lignite, or anthracite from its natural deposits in the
earth by any means or method, and the work of preparing
the coal so extracted, and includes custom coal
preparation facilities.

30 U.S.C. $ 802(h)(1976)(emphasis added). Section 3(i) of the 1969 Coal Act provided:

"work 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.

Section 3(h) did not specifically require that those involved in "the work of preparing the coal" be connected with the extractor. 8/ Moreover, to hold that the Coal Act did not apply to preparation facilities that were not connected with the extractor of the coal being prepared would remove from that Act's coverage facilities that would otherwise be regulated, except for their business arrangement, geographic location, or period of operation. We conclude that a connection with the extractor of coal was not required for a facility engaged in "the work of preparing the coal" to have been subject to the Coal Act. 9/

Alexander Brothers also argues that it does not engage in the "work of preparing the coal," but rather processes refuse "which happens to contain a small amount of coal." The company asserts that

its equipment would not function if coal mined from its natural deposit were processed by it. Alexander Brothers argues that few, if any, coal preparation operations perform all the functions it does--particularly those functions necessary to remove the foreign debris (wood, tin cans, metal, trash, garbage, etc.) from its "raw" material--and that this makes its facility "fundamentally very different from a coal preparation plant as envisioned by the ... [Coal] Act."

8/ The 1977 Mine Act's definition of "mine" was changed somewhat from that of the 1969 Coal Act. Among the modifications was the substitution in the 1977 Act of the word "or" for "and" before "the work of preparing coal." We do not regard this change to be significant; rather, we believe that Congress intended to clarify, not alter, its original intent with respect to the extent of the statute's coverage of the mining process. See S. Rep. 95-121, 95th Cong., 1st Sess. 14 (1977), reprinted in 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 602 (1978).

9/ Courts have held that a connection to extraction is not required under the 1977 Mine Act for coverage of a preparation facility. See, e.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Marshall v. Tacoma Fuel Co., No. 77-0104-B (W.D. Va. June 29, 1981).

The judge found that Alexander Brothers' processes include "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading" of coal. These are all the processes listed in section 3(i) of the 1969 Coal Act. As we noted in Oliver M. Elam, Jr., 4 FMSHRC 5 (1982), inherent in determining whether a preparation operation is a mine is an inquiry not only into whether the operator performs one or more of the listed work activities, but also into the nature of the operation. 4 FMSHRC at 7. 10/ In this regard, we held that "work of preparing the coal" signifies a process undertaken to make coal suitable for a particular use or to meet market specifications. 4 FMSHRC at 8. Here the processes undertaken by.the company are all those specifically enumerated in section 3(i). Moreover, Alexander Brothers does not dispute that it undertakes those processes in order to make coal bearing refuse marketable as coal. The mere fact that its "raw material" has a greater proportion of non-coal than that of run-of-mine preparation plants does not remove Alexander Brothers from the jurisdiction of the Coal Act.

Finally, we reject Alexander Brothers' argument that section 3(h) of the Coal Act was so vague as to violate constitutional due process

requirements. As the judge correctly noted, any perplexity concerning the meaning of the statutory section "is undoubtedly due to the broadness of the Act; not its vagueness." 3 FMSHRC at 2097.

For the foregoing reasons, the decision of the administrative law judge is affirmed.

Frank F. Jestrab, Commissioner

10/ Although Elam arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (Supp. III 1979), that statute's definition of "work of preparing the coal" is identical to the definition in the 1969 Coal Act.

~546

Distribution

Donald D. Saxton, Jr., Esq.
63 South Main Street
Washington, Pennsylvania 15301

Linda Leasure, Esq.
Leslie J. Canfield, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203