

CCASE:

MSHA V. MINERAL COAL SALES

DDATE:

19850516

TTEXT:

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

May 16, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket Nos. VA 83-26

VA 83-36

v.

VA 83-39

VA 83-44

MINERAL COAL SALES, INC.

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises from four citations issued to Mineral Coal Sales, Inc. ("Mineral"), for regulatory violations alleged to have occurred at its Mineral Siding facility. As its sole contention on review, Mineral argues that its Mineral Siding facility is not a "mine" and that Mineral itself is not an "operator" within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982). A Commission administrative law judge rejected these arguments, found that the Secretary of Labor had established the existence of the violative conditions, and assessed civil penalties against Mineral for those violations. 6 FMSHRC 809 (April 1984) (ALJ). For the reasons set forth below, we affirm. Mineral is the owner of Mineral Siding, a facility that consists of a railroad siding, a storage yard, and a trailer that houses laboratory equipment for testing coal. Equipment at the site includes a truck scale, a mobile tippie that crushes coal and conveys it onto railroad cars, a stationary grading tippie, and front-end loaders used to transfer coal from various stockpiles to the tipples. A combination house and office building adjacent to the tract serves as Mineral's office.

~616

At the time of the events at issue, Mineral extracted no coal itself and was not affiliated with any producing mine or transportation company. Rather, the coal handled at its facility was purchased by coal brokers from producing mines or from independent truckers. The brokers arrange for delivery of coal by truck to Mineral Siding and, after loading, for delivery of the coal by rail

to their various customers. Mineral charges the brokers a flat rate per ton of coal loaded onto the railroad cars. The coal broker last operating at Mineral Siding was Hubbard Enterprises of Southwest Virginia, Inc. ("Hubbard").

Coal trucked to Mineral Siding is weighed on a truck scale by a Hubbard employee, who then directs the hauler to dump the coal on a specific stockpile. Coal of substantially the same quality is stockpiled together. Once the coal is dumped onto a stockpile, Hubbard tests it to determine BTU, ash, and sulfur content, and its free swelling index. When coal is to be loaded for shipment to a customer, Hubbard informs Mineral as to how many scoops of coal should be taken from particular stockpiles in order to fill the appropriate number of railroad cars comprising the order. Mineral then draws off the proper number of scoops from the stockpiles and dumps them into the hopper of the mobile tipple. Another Mineral employee operates the tipple and oversees the loading of the railroad cars. The coal passes from the hopper of the tipple into the crusher unit where it is crushed to a uniform size. The coal then travels on the tipple's conveyor belt and is loaded onto the railroad car. When each railroad car is full, the mobile tipple is repositioned to load the next car. Once a railroad car is loaded, Hubbard again samples and tests the coal to ensure that the load meets the specifications of the respective order.

A stationary grading tipple is also present at the Mineral Siding facility. Coal passes over various sizing screens to separate "lump", "egg" and "stoker" coal. This tipple is used primarily to produce coal for domestic consumption.

At various times relevant to these proceedings, Mineral leased property interests in Mineral Siding to other business concerns. From January 1982 through June 1982, Mineral leased the facility to Summit Resources, Inc. During the latter part of its leasehold, Summit denied inspectors of the Department of Labor's Mine Safety and Health Administration (MSHA") access to the facility. MSHA obtained a court order allowing the inspection. When the inspectors returned, Mrs. Bobbie Slusher, Mineral's president and sole stockholder, informed them that Mineral had resumed control of the facility and permitted the inspection.

From July 1982 through the end of February 1983, Mineral leased the Mineral Siding facility to a company known as Interwise. Interwise operated Mineral Siding on a trial basis with the intention of purchasing the facility from Mineral. When Interwise was unable to obtain the financing necessary to complete the transaction, Mrs. Slusher terminated its lease and Mineral again proceeded to operate the facility itself.

From June 1982 through at least the time of the hearing, Mineral leased Hubbard that portion of Mineral Siding necessary to conduct Hubbard's operations. While Hubbard did not have exclusive use of the facility, it was entitled to first use to conduct its business. During the time that Interwise operated Mineral Siding, Hubbard paid Mineral a flat rate per ton for use of the loading facility and for the loading of its coal. Mineral, in turn, paid Interwise one-half of that amount for doing the actual loading. When operation of the facility reverted to Mineral from Interwise on March 1, 1983, Mineral realized the full amount for the coal its employees loaded for Hubbard. Hubbard continued to rent an office in the same building where Mineral maintained its office. Hubbard also rented for its exclusive use the trailer and laboratory facilities used for testing coal. None of these leases or contracts were ever reduced to writing.

Each entity operating at Mineral Siding maintained its own payroll and controlled its own employees. Typically, not more than a total of four employees from all the entities were present on the property at any time. When Interwise operated the facility, two of Mineral's current employees, Mrs. Slusher's brother-in-law and her nephew, were on its payroll and were responsible to its management. During Interwise's tenancy, Mineral had no employees. Following termination of the Interwise lease, its two employees were placed on Mineral's payroll.

In December 1982 and January 1983, during Interwise's lease of the facilities, MSHA cited Mineral for two violations of 30 C.F.R. □ 50.30 for failure to submit accurate quarterly employment and production reports. On March 1, 1983, the day Mineral terminated the lease to Interwise and resumed operation of the facility, MSHA cited Mineral under 30 C.F.R. • 71.803 for failure to conduct a periodic noise survey for two employees. Prior to that date, the affected employees had been employed by Interwise. Also on March 1, MSHA cited Mineral under 30 C.F.R. • 77.1705 for failure to provide first aid refresher training for a supervisory employee during the previous calendar year. The supervisory employee had been employed by Interwise at the close of the previous calendar year. Mineral contested the four citations arguing primarily that the Mineral Siding facility was not a mine and that it was not a mine operator. In his decision, the judge rejected both arguments. The judge applied the principles enunciated in *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5 (January 1982), but distinguished the facts in the present case from those giving rise to Elam's holding that the commercial loading dock involved therein was not a "mine". The judge found that, unlike the operation involved in Elam, "the coal loading process carried out [at the Mineral Siding facility] includes a procedure and

practice whereby the coal that is ultimately loaded and shipped to the customers of Hubbard ... is mixed to their particular specifications and standards." 6 FMSHRC at 840. The judge further found that the "operation carried

~618

out by [Mineral] includes the custom blending and loading of coal to meet the ... specifications and needs of Hubbard's customers."

6 FMSHRC at 841. With regard to his finding that Mineral was an "operator" under the Mine Act, the judge commented:

While I consider [Mineral's] "mining operation" to be a rather low key family operation, it does in fact qualify as a "mine" under the Act. My view here is that the operations carried out by Hubbard ... and Mineral ... consist of small family oriented business ventures which may not compare in size and scope with some other mining operations inspected by [MSHA]. However, ... I am constrained to find that [Mineral] is a "mine operator" within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction.

6 FMSHRC at 840. The judge affirmed the citations issued to Mineral and assessed civil penalties.

On review Mineral contests only the judge's findings that the Mineral Siding facility is a "mine" and that Mineral is an "operator".

We address first the question of whether the Mineral Siding operation is a "mine" within the meaning of the Mine Act.

Section 4 of the Mine Act, 30 U.S.C. • 803, provides that each "coal or other mine" is subject to the Act. The definition of the term "coal or other mine" provided in section 3(h) of the Act is extremely broad. 1/ A "mine" includes the area of land from which minerals are extracted, roads appurtenant to such areas, lands and facilities used in the work of extracting, milling, or preparing coal or other minerals, and custom coal preparation facilities. The central question in this case is whether coal preparation, or the "work of preparing the coal", is carried out at Mineral Siding.

That term is defined in section 3(i) of the Act:

"[W]ork of preparing the coal" means the breaking crushing, sizing, cleaning, washing, drying,

1/ Section 3(h), 30 U.S.C. • 802(h), states:

(1) "[C]oal or other mine" means (A) an area of land from which materials are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including (footnote 1 continued)

~619

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).

In previous decisions, the Commission has discussed the basic framework for determining whether a coal handling operation is engaged in coal preparation. In Elam, the Commission held that under the statutory definition the mere fact that some of the work activities listed in section 3(i) are performed at a facility is not solely determinative of whether the facility properly is classified as a "mine". Rather:

[I]nherent 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 activities, but also into the nature of the operation performing such activities. ...

footnote 1 end.

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. ...

(2) For purposes of titles II, III, and IV, "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, 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).

~620

... [A]s used in section 3(h) and as defined in section 3(i), "work of preparing [the] 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.

4 FMSHRC at 7, 8 (emphasis in original). In Elam, the Commission

held that a commercial loading dock that loaded coal, in addition to other materials, was not a "mine". The Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading business and not to meet customer's specifications or to render the coal fit for any particular use.

The Commission followed Elam, in *Alexander Brothers, Inc.*, 4 FMSHRC 541 (April 1982), a case arising under the 1969 Coal Act, 30 U.S.C. • 801 et seq. (1976) (amended 1977). We concluded that an operation that extracted materials from a waste dump and separated coal from the refuse in order to market the coal was engaged in coal preparation. Accord: *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3rd Cir. 1979) (a facility that separated coal fuel from material dredged from a river bottom by another entity was engaged in coal preparation under the Mine Act). The Commission has also emphasized that a preparation or milling facility need not have a connection with the extractor of the mineral in order to be subject to coverage of the Mine Act. *Carolina Stalite Co.*, 6 FMSHRC 2518, 2519 (November 1984); *Alexander Brothers, Inc.*, 4 FMSHRC at 544.

Applying the above criteria, we have no difficulty concluding that the business engaged in at Mineral Siding constitutes "mining" under the Act. At this facility coal is stored, mixed, crushed, sized, and loaded--all activities included in the statutory definition of coal preparation. Furthermore, an examination of the nature of the Mineral Siding operation reveals that, unlike the commercial loading dock in Elam at which coal was crushed merely to facilitate loading and transportation on barges, at Mineral Siding all of the above listed work activities are performed on the coal to make it "suitable for a particular use or to meet market specifications."^{2/} Thus, coal preparation occurs at Mineral Siding and MSHA properly asserted its inspection authority over the facility.

Mineral further argues, however, that its employees at the Mineral Siding facility merely load coal from two or three different stockpiles and that such activity does not constitute coal preparation, particularly when such selective loading is done under the direction and control of the other entity involved, Hubbard. In effect, Mineral contends that the various activities at the Mineral Siding facility should be analyzed in isolation from one another. We reject this approach. In examining

^{2/} Coal is the sole commodity handled at Mineral Siding. In Elam, only 40 to 60 percent of the tonnage loaded was coal. Elam, 4 FMSHRC at 5.

~621

the "nature of the operation" performing work activities listed in section 3(i), the operations taking place at a single site must be

viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in reality, is one operation. This approach is particularly appropriate in the present case in view of the pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities.

Having determined that the Mineral Siding facility is a mine, we further hold that Mineral Coal Sales was properly found to be an operator of that mine. Section 3(d) of the Mine Act defines the term "operator" as follows:

"[O]perator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]

30 U.S.C. • 802(d). Mineral is the owner of the Mineral Siding facility, which, as concluded above, is a "mine". The record reveals that Mineral maintained an active presence at Mineral Siding, retained sufficient control over the facility to terminate leases at will, and before, during, and after the various leaseholds, operated and supervised the facility itself. Given the statutory definition and these facts, MSHA's citation of Mineral as an operator of the Mineral Siding facility must be upheld.

For the reasons set forth above, the decision of the administrative law judge is affirmed.^{3/}

^{3/} Pursuant to section 113(c) of the Mine Act, 30 U.S.C. • 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

~622

Distribution

Debra Feuer, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Robert T. Winston, Esq.

Mullins, Winston, Stout & Thomason

30 Seventh Street

P.O. Box 408

Norton, Virginia 24273

Administrative Law Judge George Koutras

Federal Mine Safety & Health Review Commission

5203 Leesburg Pike, 10th Floor

Falls Church, Virginia 22041