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MSHA V. PENNSYLVANIA ELECTRIC  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
October 10, 1989

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)      Docket No. PENN 88-227

v.

PENNSYLVANIA ELECTRIC COMPANY

BEFORE: Ford, Chairman, Backley, Doyle, and Lastowka, Commissioners

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"), and involves two violations of a mandatory safety standard at Pennsylvania Electric Company's ("Penelec") Homer City Steam Electric Generating Station ("Generating Station" or "Station"). The question before us is whether the Secretary of Labor ("Secretary") properly issued Penelec citations under the Mine Act charging violations of mandatory mine safety standards. A Commission administrative law judge upheld the Secretary's action in proceeding against Penelec under the Mine Act. 10 FMSHRC 1780 (December 1980)(ALJ). Penelec petitioned for review asserting that the cited working conditions are subject to the Occupational Safety and Health Act of 1970. 29 U.S.C. 651 et seq., (1982), rather than the Mine Act. We granted Penelec's petition and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand the matter for the taking of additional evidence on the important question presented and for the entry of a new decision.

The Generating Station is located at Homer City, Indiana County, Pennsylvania. The Station is operated by Penelec and owned by Penelec and the New York State Electric & Gas Corporation ("NYSEG"). At the Station electricity is generated by coal combustion. The Station burns

approximately 4.5 million tons of coal each year. The coal purchased by Penelec enters the Station from three sources: from a conveyor running from an adjacent Helen Mining Company mine; from a conveyor running from an adjacent Helvetia Mining Company mine; and from a truck-dump facility receiving coal brought from various other mines in Pennsylvania.

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The conveyors from the Helen and Helvetia mines deliver the coal to scales where it is weighed and sampled, and where title passes to Penelec and NYSEG. The coal from these mines is then transported by conveyor to a bin where it is combined and again sampled. The coal is then placed on conveyors 5A and 5B, which transport the coal to a second bin.

Because the Helen-Helvetia coal, when burned, generally yields sulfur dioxide emissions that do not comply with state and federal environmental standards, most of the coal travels from the second bin to an on-site coal cleaning plant. Some of the coal from the truck receiving facility also travels from the first to the second bin via conveyors 5A and 5B, and from the second bin to the coal cleaning plant. At the coal cleaning plant the coal is broken, crushed, sized, washed, cleaned, dried and blended. The plant, which is entirely located at the Station, is owned by Penelec and NYSEG, but is operated under contract by the Iselin Preparation Company ("Iselin"), a subsidiary of Rochester and Pittsburgh Coal Company. The coal cleaning plant has been inspected regularly by MSHA since becoming operational in 1977.

On January 7, 1988, John Kopsic, an inspector of the Department of Labor's Mine Safety and Health Administration (MSHA), issued two citations to Penelec for violations of 30 C.F.R. 77.400(c), a mandatory mine safety standard requiring guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys. 1/ The citations alleged that the head drives of conveyors 5A and 5B were not adequately guarded to protect persons who might come in contact with the head rollers. 2/

It is this assertion by the Secretary of the applicability of Mine Act safety standards to the 5A and 5B conveyor head drives that is the subject of the dispute in this case. (The Secretary does not assert jurisdiction under the Mine Act with respect to working conditions inside the generating facilities at the Station. The Secretary instead asserts that working conditions inside the generating facilities are regulated by her under the Occupational Safety and Health Act of 1970, *supra*, ("OSHAct")).

The parties agree that in August 1977, Penelec reached an oral understanding with the Mining Enforcement and Safety Administration ("MESA") regarding MESA's and OSHA's jurisdiction over the coal cleaning and coal

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1/ 30 C.F.R. 77.400(c) states:

Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

2/ The "head" end of a belt conveyor is the ultimate delivery or discharge end. The "head drive" is the means by which mechanical power is transmitted to the head pulley of a belt conveyor. See U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms, 554, 555 (1968).

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handling facilities at the Generating Station. Stip. 2. (MESA was an agency in the Department of Interior charged with enforcing the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977). MESA's enforcement function was transferred to the Department of Labor and MSHA by the 1977 Mine Act). Penelec's understanding of the agreement is represented by an inter-office memorandum, dated September 6, 1977, memorializing a meeting of representatives of MESA, Iselin and Penelec called "to establish definite lines of jurisdiction at the coal cleaning plant." Tr. 4-6; Jt. Exh. 1. The memorandum states in pertinent part:

At ... [the second bin] MESA will have jurisdiction on everything above the top of the bin except for the portions of #5A and #5B conveyors within the structure including the drive units and head pulleys. [3/]

Notwithstanding this agreement, MSHA, without Penelec's knowledge, inspected the head drives of the 5A and 5B conveyors on January 7, 1988. Stip. 4. Penelec's counsel stated that OSHA has inspected the area prior to that time and that no MSHA inspections had been made of the cited area. Tr. 9. Counsel for the Secretary stated that he did not know whether OSHA had inspected the area and that the Pittsburgh area OSHA office had no record of OSHA inspections. Tr. 10. Penelec's counsel further stated that Penelec was unaware that there had been any change from the 1977 agreement concerning whether MSHA or OSHA would inspect the head drives. Tr. 17.

In his decision, the judge held that the question of whether Penelec was properly cited for violations of the Mine Act was "to be determined by whether the head drives for the 5A and 5B conveyors ... are part of a facility that is a 'coal or other mine.'" 10 FMSHRC at 1781. The judge noted that the statutory definition of "coal mine" includes "all structures, facilities, machinery, tools, equipment...and other property, ...used in, or to be used in...the work of preparing the coal," and that the statutory definition of "work of preparing the coal" includes the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of...coal." 30 U.S.C. 802(h)(2), 802(i); 10 FMSHRC at 1781. The judge stated that the definitions are to be given broad interpretations and doubts are to be resolved in favor of coverage. 10 FMSHRC at 1781.

Summarizing the general process of the transport of coal at the Generating Station (10 FMSHRC at 1781-82), the judge found:

[A]t least some raw coal is transported on the 5A and 5B conveyor belts which run over the 5A

and 5B head drives on its way to the Iselin  
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