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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 28, 1990

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

v. Docket No. PENN 88-227

PENNSYLVANIA ELECTRIC COMPANY

BEFORE: Ford, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION
BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act"), and is before us for a second time on review. The Secretary of Labor alleges that Pennsylvania Electric Company ("Penelec") twice violated 30 C.F.R. 77.400(c) by failing to guard two head conveyor drives at its Homer Cit Electric Generating Station ("Generating Station" or "Station"). 1/

The primary question before the Commission in our previous review was whether the cited working conditions were governed by regulations enforced by the Secretary under the Mine Act, as argued by the Secretary, or by regulations enforced by the Secretary under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1988) ("OSHAct"), as argued by Penelec. A majority of the Commission

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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.

The "head" end of a belt conveyor is the delivery or discharge end. The "head drive" is the device by which mechanical power is transmitted to the head pulley of a belt conveyor. See Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 532, 533 (1968).

held that the Secretary properly could decide to make mine safety and health standards applicable to the cited area, but remanded the case to Commission Administrative Law Judge Gary Melick for further proceedings because the record did not clearly indicate whether the Secretary had properly asserted Mine Act jurisdiction. Pennsylvania Electric Co., 11 FMSHRC 1875, 1882 (October 1989)("Penelec"). The Commission stated:

> Because of the pervasive ambiguity in the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions... we find it appropriate to order further proceedings.

11 FMSHRC at 1885. On remand the judge held that he could not find "any legally cognizable Secretarial impropriety in exercising her authority to regulate [the area in question] within the framework of the Act." 12 FMSHRC 123, 124 (January 1990)(ALJ).

I.

Chairman Ford and Commissioner Doyle would reverse the judge's decision and Commissioners Backley and Nelson would affirm. 2/ As a consequence, the Commission is evenly split, a first-time occurrence at the Commission. We conclude that the effect of the split decision is to allow the judge's decision on remand to stand as if affirmed.

Section 113(c) of the Mine Act authorizes the Commission to delegate to "any group of three or more members any or all of the powers of the Commission." 30 U.S.C. 823(c). The Commission has frequently designated itself as a panel of three members to exercise the powers of the Commission. The Mine Act does not expressly state that disposition of a case (whether affirmance or reversal) shall occur through the majority vote of the Commission or a designated group (panel) of its members. The legislative history provides some indication that case disposition is to be by the traditional judicial process of simple majority vote:

> The Commission is authorized to act in panels of three members, with a majority of each panel sufficient to decide a matter. This organization is patterned after that of the National Labor Relations Board and is intended to give the Commission a more flexible administrative organization in order to facilitate the efficient processing of cases before the Commission.

S. Rep. No. 181, 95th Cong., 1st Sess. 47-48 (1977), reprinted in Senate

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2/ Commissioner Lastowka did not participate in the consideration or disposition of this second review proceeding in this case.

Subcommittee on Labor, Commit+.e on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 635-36 (1978) ("Legis. Hist.")(emphasis added). However, neither the Mine Act nor its legislative history addresses the additional subject of the effect of an evenly divided Commission panel.

In the absence of a definitive indication in the statute and its history, it is instructive to turn to general principles of federal adjudication. The United States Supreme Court affirms the decision of the lower court when the justices are evenly divided. In an early case where the justices were divided, Chief Justice Marshall, writing for the Court, held that "the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it." Etting v. Bank of the United States, 11 Wheat. 59, 78 (1826). In practice, appellate courts allow the lower court decision to stand when there is an evenly split decision. In a later case, the Court explained:

> If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force.

Durant v. Essex Co., 74 U.S. 107, 112 (1868).

In a somewhat analogous context, courts of appeal have held that evenly split decisions of the Occupational Safety and Health Review Commission ("OSHRC") are reviewable. George Hyman Construction Co. v. OSHRC, 582 F.2d 834 (4th Cir. 1978); Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3rd Cir. 1980). These courts determined that because an evenly split OSHRC decision is analogous to an evenly split court decision, the administrative law judge's decision should be allowed to stand. Id. The courts reasoned that the party losing before the administrative law judge is placed in a "jurisdictional limbo" unless the OSHRC order is appealable to the Court of Appeals. Hyman Construction Co., 582 F.2d at 837. In each case, the court determined that the OSHRC decision was a final order for purposes of judicial review and therefore subject to examination "by the next link in the hierarchal chain of review." Marshall, supra, 622 F.2d at 1180.

Several courts of appeals, however, have held the OSHRC errs when it issues a decision with an evenly split vote because "no official action can be taken by the Commission without the affirmative vote of at least two [of its three] members." Shaw Construction, Inc. v. OSHRC, 534 F.2d 1183, 1185 (5th Cir. 1976). See also, Cox Brothers, Inc. v. Secretary of Labor, 574 F.2d 465 (9th Cir. 1978). The court in each case determined that the OSHRC's decision was not a reviewable order within the jurisdiction of the

Court. The holding in each of these cases, however, was based in large part on language in the OSHAct that is not contained in the Mine Act. 3/

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3/ Section 12(e) of the OSHAct provides that "official action can be taken only on the affirmative vote of at least two members." 29 U.S.C. 661(f).

A review of the Mine Act and its legislative history reveals no intent to limit judicial review of Commission decisions. The purpose of Congress in authorizing the Commission to act in panels of three or more members was to provide "a more flexible administrative organization in order to facilitate the efficient processing of cases." Legis. Hist. at 636. Adopting the traditional federal judicial model for handling evenly split decisions of this adjudicatory Commission will advance that Congressional objective. Accordingly, all Commissioners participating in this matter hold that this decision is a final order of the Commission subject to judicial review under section 106 of the Mine Act, 30 U.S.C. 816. Because a majority of the Commission did not vote to reverse th decision of the administrative law judge, his decision stands in full force, as if affirmed. Set forth in section III of this decision, infra, are the Commissioners' separate opinions with respect to the merits of this case.

II.

Penelec also has raised two procedural matters on review. First, Penelec argues that Judge Melick deprived it of the opportunity to resolve ambiguities in the record by denying its motion to consolidate this case with other cases pending before the judge, which also raise jurisdictional issues concerning the Generating Station. The Commission's procedural rule provides that an administrative law judge "may ... order the consolidation of proceedings." 29 C.F.R. 2700.12. A determination to consolidate lies in the sound discretion of the trial judge. In this instance, the judge decided not to consolidate the present case, involving two citations that had already been tried, decided and appealed to the Commission, with challenges to 23 subsequently issued citations that had not yet been tried. Instead, the judge stayed the hearing on the subsequently issued citations. Given these facts, all Commissioners participating hold that Judge Melick did not abuse his discretion in denying Penelec's motion to consolidate.

Penelec also argues that Judge Melick erred in denying its motion to reopen discovery. Penelec maintains that it was unable to present adequate evidence at the hearing on remand to establish a basis for determining whether the Secretary exercised her jurisdiction appropriately. It contends that the judge denied its motion without good cause. See 29 C.F.R. 2700.55(a). It states that additional discovery was necessary because "[o]nly with the Commission's October 1989 decision was Penelec on notice that the Secretary might legitimately assert jurisdiction" at the Generating Station. Penelec Br. at 32.

We hold that Judge Melick did not abuse his discretion in denying Penelec's request to take discovery out of time. Penelec waited until

December 1, 1989 to request discovery with respect to the issues remanded to the judge on October 10, 1989. Penelec has set forth no explanation why it did not seek to initiate this discovery earlier. Penelec's delay is particularly puzzling because the judge issued the

notice of hearing on October 20, 1989 and a prehearing order on November 8, 1989. Instead of seeking discovery within a reasonable time after the case was remanded, it waited until 12 days before the scheduled hearing to request discovery. We agree with the judge that Penelec's request for discovery was untimely and that it failed to show good cause for extending the time for initiating discovery. Under these facts, all Commissioners participating hold that the judge did not abuse his discretion.

III.

The opinions of the Commissioners on the merits of this case follow.

Commissioners Backley and Nelson, in favor of affirming the decision of the administrative law judge:

A majority of this Commission previously determined that "MSHA possesses statutory authority to regulate working conditions associated with Penelec's preparation of coal, and that therefore the Secretary of Labor could decide to make mine safety standards applicable" to the 5A & 5B head drives at Penelec's Generating Station. Penelec, 11 FMSHRC at 1882. This case was remanded to the administrative law judge because the Commission was unable to determine with any degree of assurance from the murky record" whether the Secretary had decided to make mine safety standards or OSHA standards applicable to the head drives. Id. The record contained no evidence of enforcement activity by OSHA or MSHA prior to the issuance of the subject citations and no evidence that the Secretary adhered to the procedures set forth in the MSHA-OSHA Interagency Agreement ("Interagency Agreement"), 44 Fed. Reg. 22827 (1979), for resolution of jurisdictional conflicts between the two agencies. Penelec, 11 FMSHRC at 1883. The Commission concluded that "[b]ecause of the pervasive ambiguity of the record on the question of whether the Secretary of Labor, through MSHA, has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station," the case should be remanded for the taking of further evidence. Penelec, 11 FMSHRC at 1885.

At the hearing on remand, Inspector John Kopsic, the MSHA inspector who issued the head drive guarding citations involved in this case, testified that he regularly inspected the 5A and 5B conveyor belts prior to the issuance of the subject citations. Remand Tr. 118-19, 122, 124-25, 132. He further testified that he has been regularly inspecting this area since 1982 and that he has issued citations for guarding violations at the 5A and 5B head drives. Id. Based on this "newly developed undisputed evidence," the judge found that "MSHA had indeed previously inspected, and issued citations for violations at, the subject 5A and 5B head drives." 12 FMSHRC at 125 n.1. As Penelec presented no evidence to the contrary,

the judge's finding in this regard is supported by substantial evidence.

Furthermore, MSHA had previously issued citations at these head drives to Rochester and Pittsburgh Coal Company ("R&P") or its subsidiary (Iselin Preparation Company), the operator of the coal cleaning plant at the Generating Station, and, according to Inspector Kopsic, Penelec was aware of these previous citations because its own employees abated the violations. Remand Tr. 127, 128-32, 150. The inspector further testified that on one occasion he had observed that a Penelec supervisor was present during the abatement of a head drive violation. Remand Tr. 128. Inspector Kopsic stated that he issued the present guarding citations to Penelec because the safety director of R&P's coal cleaning plant informed him that Penelec employees had removed the guards from the head drives and that it was Penelec's responsibility to maintain that area. Remand Tr. 153. Based on this evidence, the judge concluded that Penelec was aware of the previous inspections and violations at the head drives. 12 FMSHRC at 125 n.1. Again, Penelec did not present any evidence on this issue, and substantial evidence supports the judge's finding.

Based on the evidence presented at the remand hearing, it is apparent that the Secretary has consistently applied mine safety and health standards to the 5A and 5B head drives. No evidence was presented that the Secretary has applied occupational safety and health standards to these head drives. Consequently, we conclude that the Secretary has demonstrated that she has properly exercised her authority to regulate the working conditions at the cited area under the Mine Act. In addition, the record makes clear that Penelec had actual or constructive knowledge that citations had been issued in the past for violations of mine safety and health standards at the 5A and 5B head drives. Its employees participated in the abatement of these previous violations. The fact that past citations were issued to R&P is not controlling. An owner and its independent contractor are "operators" under section 3(d) of the Mine Act, 30 U.S.C. 802(d), and either, in appropriate circumstances, may be held liable for violations of safety standards regardless of fault. See e.g., International Union, UMWA v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988). Thus, the fact that MSHA cited R&P, an independent contractor, rather than Penelec, the owner, for past violations in the disputed area does not, by itself, negate MSHA's enforcement history or Penelec's knowledge of it.

The Interagency Agreement was developed, in part, to "provide a procedure for determining general jurisdictional questions." 44 Fed. Reg. 22827. In the Commission's previous decision, the majority determined that the first clear assertion of MSHA jurisdiction in the record was contained in an April 12, 1988 letter from the MSHA District Manager to Penelec stating that MSHA was expanding its inspection authority at the Generating Station to include all areas directly involved in the coal preparation process. Penelec, 11 FMSHRC at 1883. The record revealed that

a copy of this letter was sent to the OSHA Area Office. On the basis of this evidence, the Commission questioned whether the Secretary had properly invoked her jurisdiction through the procedures set forth in the Interagency Agreement.

The evidence produced by the Secretary on remand makes clear that the particular area in question has been inspected by MSHA since at

least 1982 and no evidence was produced to show that OSHA has ever inspected it. As a consequence, the Interagency Agreement has no bearing on this case because no question or conflict between OSHA and MSHA existed. We now know that the Secretary has consistently inspected the head drives under the Mine Act rather than the OSHAct. As discussed above, Penelec had notice of this fact.

Penelec and Edison Electric Institute ("Edison"), amicus curiae, also question at this stage MSHA's jurisdiction to inspect the head drives. Because the Commission previously determined that such jurisdiction exists, we need not respond to these arguments. 4/ We adopt the holding of the majority in our previous decision that MSHA has jurisdiction over the 5A & 5B head drives.

Accordingly we would affirm the decision of the administrative law judge.

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

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4/ We note that Penelec's and Edison's additional argument that MSHA cannot preempt OSHA's jurisdiction without first promulgating rules and regulations addressing the working conditions in electric generating facilities was not previously presented to the judge. Except for good cause shown, no assignment of error by a party may rely on any question of fact or law upon which the judge has not been afforded the opportunity to pass. 30 U.S.C. 823(d)(2)(A)(iii); Union Oil Co., 11 FMSHRC 289, 297 (March 1989). Penelec has not shown any cause why this argument was not made to the judge. In addition, we note that MSHA does have broad safety standards in place governing belts and head drives. Thus, MSHA's standards address the working conditions of the cited area. MSHA is not necessarily required to develop more particularized standards that apply exclusively to those portions of electric generating facilities that are subject to its jurisdiction.

Chairman Ford, in favor of reversing the decision of the administrative law judge:

As a member of the majority in the Commission's prior consideration of this case, 11 FMSHRC 1875, I concurred in the decision to vacate Judge Melick's initial decision and to remand the matter for the taking of additional evidence on the jurisdictional issues giving rise to this dispute. I further concurred in the view that the broadly drawn definitions of "coal or other mine" and "coal mine" in section 3(h) of the Mine Act, 30 U.S.C. 802(h), did implicate certain facilities at Penelec's Homer City Steam Electric Generating Station, such that the Secretary could assign occupational safety and health enforcement regarding those facilities to the Mine Safety and Health Administration.

The principal question that led me to join my colleagues in the majority was whether the Secretary had indeed assigned such enforcement authority to MSHA. Flowing from that principal question was my concern as to whether the assignment, if executed, was executed with sufficient clarity as to have given Penelec adequate notice that its coal handling activities at the Generating Station would be subject to Mine Act authority before the enforcement actions at issue were taken. The majority had concluded that such questions could not be answered on the basis of the "murky record" before us. 11 FMSHRC 1882. Regrettably, the record developed on remand and now before us on review is in many respects even murkier.

As supplemented by the remand proceeding, the record still exhibits inconsistencies in enforcement policies and practices (some of which the judge characterized as "bizarre"); unanswered questions as to whether there is an overall Departmental plan for accommodating jurisdictional tensions between the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1982) at coal-fired electric power plants; and a patchwork scheme of inspections that does not adequately address the prior majority's concerns respecting the "whipsaw effects to which an employer can be subjected when important jurisdictional issues appear to be resolved with no assurance that potentially competing agencies have reached a mutual and definitive determination as to their respective roles." 11 FMSHRC 1885.

For those reasons I must part company with my two colleagues who find that "the Secretary through MSHA has properly exercised her authority to regulate the cited working conditions at Penelec's Generating Station." Id. It has not been demonstrated that the agencies involved, let alone Penelec, had a clear understanding of the jurisdictional lines of demarcation at the time the citations were issued.

The record, both initially and on remand, establishes the following pertinent chronology:

July 5, 1977 - District Manager Huntley by letter informs William Mason, OSHA operations officer, that contrary to OSHA's position that the Iselin Preparation Plant is under OSHA's jurisdiction, the Deputy Associate Solicitor for Mine Health and Safety (Department of the Interior) has determined that the Iselin Preparation Plant is under the Mining Enforcement and Safety Administration's (MESA's) jurisdiction. (Gov. Ex. 1).

July 28, 1977 - Coal Mine Inspection Supervisor Robert G. Nelson by Memorandum delineates those locations at the Generating Station where Iselin Preparation Co. "has or will have control." (Gov. Ex. 2). They include a "blending bin" subsequently identified at the remand hearing as being the same as bin No. 2 by Inspector Kopsik (Tr. p. 133). No specific reference, however, is made to the 5A and 5B conveyors or to their head drives.

August 25, 1977 - Penelec and MESA meet and reach an oral agreement as to the jurisdictional lines between MESA and OSHA at the Generating Station.

September 6, 1977 - R.C. Herman, Penelec representative at the August 25 meeting, memorializes his understanding of the August 25, 1977 agreement that states in part: "At #2 Bin MESA will have jurisdiction 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." (Joint Ex. 1). (No record of MESA's understanding of the August 25, 1977 agreement has been produced in this proceeding.)

April 17, 1979 - The MSHA/OSHA Interagency Agreement is published whereby procedures are established for resolving disputes over jurisdiction between the two agencies. 42 F.R. 22827, 22828.

November 29, 1985 - In a Motion to Dismiss filed with the Commission in Utility Fuels, Inc., Docket No. CENT 85-89, Counsel for the Secretary states: "MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency. MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal but has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the

overall power plant process is more feasibly regulated by OSHA."

January 7, 1988 - MSHA Inspector Kopsic issues the two citations on review alleging violations of 30 C.F.R. 77.400(c) with regard to guarding at the 5A and 5B head drives at the Generating Station. The citations are issued to Penelec rather than to the Iselin Preparation Plant as had been the custom up to that date.

February 25, 1988 - Mr. Richard E. Orris, manager of safety for Penelec, writes to District Manager Huntley asking for Huntley's position with respect to MSHA's jurisdiction over facilities at the Generating Station including the 5A and 5B conveyors, their head pulleys and their drive units.

April 12, 1988 - District Manager Huntley responds by asserting that the 1977 Mine Act "extends to all areas which contribute to or play a part in the work of preparing coal." (Joint Ex. 3). Attached to the letter is a list of facilities that MSHA "is currently not inspecting but which MSHA has jurisdiction over and will be inspecting" and includes "[b]in No. 2 including motors, plug shoot probe, control buttons, conveyors 5A and 5B and all floors."

April 14, 1988 - District Manager Huntley forwards a copy of the April 12, 1988 letter to Mr. Gary Griess, Area Director of OSHA. (Gov. Ex. 3). (This letter was apparently lost or misdirected within OSHA since a duplicate was sent after the Commission's October 10, 1988 decision and remand and before the judge's December 13, 1989 hearing on remand. Tr. 157-160).

December 30, 1988 - Judge Melick issues his initial decision finding Mine Act jurisdiction over the 5A and 5B head drives.

January 31, 1989 - OSHA issues proposed rule 29 C.F.R. Part 1910 relating to Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, wherein the agency states the rule covers work practices at "[f]uel and ash handling and processing installations such as coal conveyors and crushers." 54 F.R. 4974, 5009.

June 28, 1989 - At oral argument in a companion case, Westwood Energy Properties v. Secretary of Labor, MSHA, 11 FMSHRC 2408 (December 1989), counsel for the Secretary indicates that other coal

consuming industries such as steel mills and alumina plants may be subject to Mine Act jurisdiction if they engage in coal processing activities. (Oral Argument Tr. pp. 22-23, 25-26).

October 10, 1989 - The Commission issues its decision and remand in this case.

December 13, 1989 - Judge issues his decision on remand.

If there is a consistent or even discernible pattern of enforcement in the above chronology, I fail to see it. Nor does Inspector Kopsik's testimony on remand serve to resolve or reconcile the discrepancies set forth above. While he testified to having inspected the 5A and 5B conveyors including the head drives and to having issued citations thereon prior to January 7, 1988, his testimony is equivocal as to the locations of the violations. Tr. 123. He had no recollection of the dates when the citations were issued and it appears that the citations, when issued, were issued because Iselin employees were exposed to the alleged hazards cited. Tr. 155. Unfortunately, none of the citations Inspector Kopsik testified to was introduced into evidence so as to document his generalized testimony with respect to the scope of his pre-1988 inspections at the Generating Station. In any event, regardless of what Inspector Kopsik and his immediate supervisors considered to be the scope of Mine Act jurisdiction at the Generating Station, there existed on January 7, 1988 no official Department of Labor policy that assigned coal handling and processing activities undertaken by an electric utility to MSHA's jurisdiction. On the contrary, the last official pronouncement of record prior to January 7, 1988 that addressed such activities was the Secretary's declaration in Utility Fuels, supra, that coal handling and processing at power plants was "more feasibly regulated by OSHA."

Furthermore, there are a number of other anomalies revealed on remand that confound any productive inquiry into the jurisdictional issues placed before the Commission in this case. First, it appears that for several years the jurisdictional lines between MSHA and OSHA were determined by the union affiliation of the employees in the various locations throughout the Generating Station. That rule of thumb seems to have been imposed early on (See attachment to the MESA memorandum of July 28, 1977 identified as Gov. Ex. 2 and Tr. pp. 97-102.) and was only officially rescinded in District Manager Huntley's letter of April 12, 1988 (Joint Ex. 3). Such a distinction assuredly has no foundation in the Mine Act.

Second, for enforcement purposes MSHA considers the Iselin Preparation Company as the mine "operator" and identifies it as such, while

the agency considers Penelec an "independent contractor" to Iselin. (Once the January 7, 1988 citations were issued, MSHA required Penelec to obtain a "contractor" identification number. Tr. p. 88). In reality the Iselin Preparation Plant is owned by Penelec but is operated by Iselin, Penelec's independent contractor and a subsidiary of the Rochester and Pittsburgh Coal Company. Thus, the enforcement scheme

employed by MSHA is based upon a characterization that is the complete obverse of the actual contractual relationship obtaining at the Generating Station.

Third, on review the Secretary takes the position that all fuel handling facilities at the Generating Station that handle "run of mine" coal are subject to Mine Act jurisdiction and MSHA enforcement while all facilities handling processed coal are subject to OSHA jurisdiction and enforcement. (Secretary's Brief, p. 21). Yet the schematic "coal flow diagram," introduced in the initial hearing as Exhibit B, clearly indicates that the Huntley letter of April 12, 1988 sought to extend MSHA's jurisdiction over facilities solely dedicated to the handling of processed coal. For example, the bottom of the diagram depicts a route for truck-delivered pre-processed coal that completely bypasses the processing facilities at the Generating Station and delivers the coal directly to generating unit 3 of the power plant. Nevertheless, the schematic identifies this bypass as subject to MSHA's jurisdiction.

In sum, the above evidence of record leads me to conclude that MSHA's authority to regulate the cited conditions at Penelec's Generating Station has not been properly exercised inasmuch as Penelec had insufficient and conflicting notice as to the scope of Mine Act authority up to the time the citations were issued in early January of 1988. Accordingly, on that basis alone I would reverse the judge and vacate the citations.

On a more fundamental level, however, the record thus far adduced calls into question whether dual enforcement by both MSHA and OSHA at the Homer City Generating Station and others similarly situated comports with Congressional intent and achieves the goals of the respective statutes from which the two agencies derive their authority and purpose.

In her brief on review the Secretary acknowledges a contradictory position respecting Mine Act jurisdiction over power. plants taken by her predecessor in Utility Fuels, supra. Secretary's brief, p. 12, but does not repudiate it. It could therefore be inferred that jurisdiction over the coal handling facilities at electric generating plants may be decided on an ad hoc, case by case basis. Such an approach, however, gives utilities and other coal consumers little guidance and less notice as to what their compliance responsibilities are to be from one location to another or from one day to another. 1/ It would also frustrate any attempts to develop corporate-wide safety programs for utility companies with multiple generating stations - some under OSHA jurisdiction alone, and some under combined MSHA and OSHA jurisdiction.

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1/ In that connection, I note with interest the settlement agreement approved on August 3, 1990 by the judge in Westwood Energy Properties, supra, a companion case to the instant case, whereby MSHA agrees not to assert jurisdiction over an electric power generating station and its fuel handling facilities located on an abandoned coal mine site even though the fuel, known as culm, contains refuse coal and undergoes processes similar to those at issue here. 12 FMSHRC

Such a lack of consistency and uniformity can have negative safety consequences even at a single location such as the Homer City Station. For instance, MSHA electrical standards for surface coal mines and facilities incorporate by reference the provisions of the National Electric Code (NEC). The NEC, however, explicitly exempts electric utility installations from its coverage. National Electric Code, 90-2(b)(5) (1971). The irony of this contradiction was not lost on the Fourth Circuit Court of Appeals when it held that a utility was not an independent contractor for purposes of the Mine Act: "MSHA would apply to electric utilities a code which by its very terms excludes electric utilities." Old Dominion Power Co. v. Donovan, 772 F.2d 92, 99 (1985). 2/

These specific standard-based conflicts attest to the "whipsaw" effects that concerned the majority in our prior decision. Viewed against the safety and health goals of the two statutes in question, however, these conflicts loom larger than mere inconveniences to those industrial entities subject to dual enforcement: they constitute a potential for confusion that can actually diminish safety as the Fourth Circuit warned. Surely Congress could not have intended such a contrary result.

The Mine Act's jurisdictional map as drawn by Congress is to be found in Section 3, specifically in the definitions of "coal or other mine" and "coal mine." Those definitions are not models of verbal brevity and clarity, but it is generally accepted that the definitions were broadly drawn in order to avoid questions of jurisdiction such as those that arose in the course of the Buffalo Creek disaster wherein the Bureau of Mines, MSHA's predecessor, encountered challenges to its authority to regulate impoundments and retaining dams directly associated with coal mining. See S. Report No. 95-181, 95th Cong., 1st Sess. 14, reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

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2/ Amicus Edison Electric Institute (EEI) argues that even if a clear line of demarcation could be drawn between those areas subject to MSHA jurisdiction and those subject to OSHA jurisdiction at a single location, inconsistencies between the respective standards of the two agencies could have adverse consequences for employee safety. For example MSHA standards require a lock out and tagging system while repairs are made on electrical systems while OSHA permits utilities to employ a tagging system only. Compare 30 C.F.R. 77.501 with 29 C.F.R. 1926.950(d). Similar differences arise with respect to clearances between mobile equipment and overhead power lines. Compare 30 C.F.R. 77.807.2 with 29 C.F.R. 1926.950(d) (Table V-1); 952(c)(2). EEI argues that such conflicting compliance requirements would complicate equipment design as well as employee safety work rules and training, and goes on to quote the Fourth Circuit in Dominion, supra: "Requiring electric utility employees suddenly to adhere

to conflicting standards depending on their job location can only lead to danger, especially where work around high voltage is involved." 772 F.2d at 99. From a safety standpoint, the arguments of amicus and the conclusions of the Fourth Circuit are most compelling.

The definition of "coal or other mine," set forth in section 3(h)(1) of the Act is divided into three parts: (A) an area of land from which minerals are extracted; (B) private ways and roads appurtenant thereto; and (C) a panoply of facilities and structures associated with the extraction, milling, and preparation of coal and other minerals. Traditionally, the three subparts of section 3(h)(1) have been considered separate and discrete so that an entity falling within any one of the three could generally constitute a "mine" for purposes of the Act. Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984). Such a reading of the definition has led the Secretary here to argue Mine Act jurisdiction over Penelec's 5A and 5B head drives since they are "equipment" used in "the work of preparing coal" which is in turn defined in section 3(i).

A plausible alternate reading of section 3(h)(1) would hold that subparts (B) and (C) are subordinate to subpart (A), i.e., that the facilities and structures referred to in (C) are those associated with the "area of land" referred to in (A). This alternate reading of section 3(h)(1) is more clearly reflected in the definition of "coal mine," section 3(h)(2), derived verbatim from the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1972).

Close analysis of section 3(h)(2) indicates that the facilities listed therein are all delimited by a geographical referent: the "mine" as that is generally and traditionally understood. Stripped of all extraneous language except that necessary for discussion here, section 3(h)(2) would read as follows:

> Coal mine means an area of land and all ... facilities ... placed upon ... or above the surface of such land ... used in the work of extracting ... bituminous coal ... and the work of preparing the coal ... and includes custom coal preparation facilities.

Put another way, the definition could be viewed as a pyramid, the delimiting and all-encompassing base of which is "an area of land" and the apex of which is "custom coal preparation facilities."

To date the Commission has not exercised strict adherence to the traditional interpretation of "coal or other mine." If it had, Oliver W. Elam, Jr. Co., 4 FMSHRC 5 (January 1982) would have been decided differently. In Elam the Commission held that a commercial dock loading operation that broke and crushed coal for easier loading was not a "mine" even though, by a strict reading of sections 3(h)(1) and 3(i), it was a "facility" and it engaged in "the work of preparing coal" to the extent that it engaged in "breaking," "crushing" and "loading" coal. Similarly,

strict adherence to the alternative interpretation of sections 3(h)(1) and 3(h)(2), proferred above, would result in an overly circumscribed scope of jurisdiction that would limit Mine Act authority to those facilities located on the same parcel of land from which the coal is extracted.

A rational path between the two extremes and one that comports

with Congressional intent is that devised by the Commission in Elam: that one looks not only to the facility or activity in question but also 'into the nature of the operation performing such activities" Id. p. 7. In other words, as pithily expressed by Commissioner Doyle in her earlier dissent, Congress did not intend MSHA "to follow the coal wherever it might go." 11 FMSHRC 1890.

The "nature" of Penelec's operation is electric power generation. The feedstock for that power generation could be oil, gas, uranium, culm or coal. The fact that coal was the chosen feedstock here does not compel a conclusion that the 5A and 5B head drives constitute a "mine" for purposes of the Act.

At some point one has to look up from the text of the statute and view the jurisdictional question through the lens of common sense and practicality, mindful that Congress intended to regulate a specific and identifiable sector of commerce by passing the Mine Act. I conclude that Penelec's coal handling facilities, including the 5A and 5B head drives, do not fall within that sector nor within the range of facilities meant to be included in sections 3(h)(1) and 3(h)(2).

That conclusion is buttressed by the record adduced here. Dual jurisdiction between OSHA and MSHA at Penelec's Generating Station and others similarly situated, with its attendant potential for conflicting compliance requirements, can have negative consequences for safety in contravention of the Congressional purposes at the heart of both the Mine Act and the Occupational Safety and Health Act.

Accordingly, upon careful consideration, I would vacate the citations at issue for lack of jurisdiction and dismiss the proceeding.

Ford B. Ford, Chairman

Commissioner Doyle, in favor of reversing the decision of the administrative law judge:

For the reasons set forth in my dissent, a copy of which is attached, I disagreed with the Commission's earlier determination that "MSHA possesses statutory authorization to regulate working conditions associated with Penelec's preparation of coal ..." 11 FMSHRC 1875, 1882 (October 1989). Nothing in either the administrative law judge's decision on remand or the decision affirming that decision dissuades me from my earlier view that the operations cited by the Secretary are not subject to the jurisdiction of the Mine Act. Accordingly, I would reverse the judge and dismiss the case against Penelec.

Joyce A. Doyle, Commissioner

Commissioner Doyle, dissenting:

The respondent, Pennsylvania Electric Company ("Penelec") is the operator of an electric power generating station and has for some years been doing on-site processing of some of the coal used at of its generating station, in order to insure compliance with EPA emission standards, issued in 1977. The coal conveyor cited in this case transports coal received from the Helen and Helvetia Mines between bins on the generating station grounds, most of the coal eventually going to the cleaning plant. Trucked coal is transported on different conveyors with only the run-of-mine portion being diverted to the cleaning plant.

In January 1988, MSHA for the first time inspected the head drives of the 5A and 5B conveyors and sometime thereafter an MSHA district manager advised Penelec that MSHA was also asserting jurisdiction over additional areas of the power plant.

The case before us deals only with alleged violations with respect to the head drives and was submitted on stipulated facts. The administrative law judge found in favor of MSHA and Penelec petitioned for review, asserting that it was not subject to the Mine Act based on:

1. The plain language of the statute and its legislative history;

2. Its work not being that usually performed by an operator of a coal mine;

3. Its being the ultimate consumer of the coal.

The majority of the Commission finds that the processes performed at Penelec's plant "are performed to prepare the coal to meet particular specifications and emission requirements" and are thus "activities ... usually performed 'by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.'" Slip op. at 6. The majority also finds Penelec's work to be "the type of work 'usually done by the operator of [a] 'coal mine.'" Slip op. at 7. They discount any exemption for the ultimate consumer of coal and, based on the language of the statute, conclude that the Secretary "properly could decide to make mine safety standards applicable to the disputed area." They are, however, unable to determine from the record whether the Secretary has made such a determination. Slip op. at 8. The majority cites numerous factors both within and outside of the record that show conflicting indications as to which agency in the Department of Labor exercises safety and health authority over operations such as Penelec's. Because of this ambiguity, they remand the matter to the administrative law

judge for the taking of further evidence on the jurisdictional question and the entry of a new decision.

I disagree that the head drives of the 5A and 5B conveyors fall within the definition of a "coal mine" as set forth in the Mine Act or that they are subject to that jurisdiction simply because, in some instances, they convey run-of-mine coal to the preparation plant, as opposed to conveying processed coal. I further believe that the case should be decided on the record before us rather than being remanded for the taking of additional evidence.

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

> (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;
> (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.

The "work of preparing coal" is defined.in section 3(i), 30 U.S.C.

802(i), as follows

> [i] "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.

A portion of the legislative history pertaining to these sections has been widely quoted in determining Mine Act coverage. That language states that the definition of a mine is to be given the broadest possible interpretation and that doubts should be resolved in favor of inclusion. However, examination of that entire passage of the legislative history indicates a context in which Congress was contemplating regulation of mines in a more traditional sense. The complete passage reads as follows:

> Thus, for example, the definition of 'mine' is clarified to include the areas, both underground and on the surface, from which minerals are extracted (except minerals extracted in liquid form underground), and also, all private roads and areas appurtenant thereto. Also included in the definition of 'mine' are lands, excavations, shafts, slopes, and other property including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to clarify its intent. The collapse of an unstable dam at Buffalo Creek, West Virginia, in February of 1972 resulted in a large number of deaths, and untold hardship to downstream residents, and the Committee is greatly concerned that at that time, the scope of the authority of the Bureau of Mines to regulate such structures under the Coal Act was questioned. Finally, the structures on the surface or underground, which are used or are to be used in or resulting from the preparation of the extracted minerals are included in the definition of 'mine'. 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 possibly [sic] interpretation, and it is the intent of this Committee

> that doubts be resolved in favor of inclusion of a facility within the coverage of-the Act." S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in U.S. Code Cong. & Admin. News 1977, 3401, 3414.

While that language is expansive, it is mine oriented, and it cannot be forgotten that the Act was intended to establish a "single mine safety

and health law, applicable to all mining activity." S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) (emphasis added). "The statute is aimed at an industry with an acknowledged history of serious accidents." Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 594 (3d Cir. 1979). There is no indication of any intention to follow the coal wherever it might go and certainly no indication that Congress intended to regulate other industries such as electric utilities or steel mills as only recently asserted by the Secretary. 1/ Indeed, the courts have recognized that it is "clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984).

I recognize that, in addition to considering Congress' concerns as set forth in the legislative history, deference is generally to be accorded interpretations by the agency charged with enforcing the law. Here, however, the record contains no evidence that, since the Mine Act became effective in 1978, the Secretary has made any previous attempt, either by the issuance of regulations or otherwise, to include electric power plants within the Act's coverage or to put the operators of such facilities on notice of liability under the Mine Act. Nor does the record indicate that the efforts of a district manager to bring Penelec's facility within its coverage represents anything more than the district manager's own personal interpretation of the Mine Act.

It should be noted that the Secretary's counsel stated at oral argument that resolution of this case rests solely on the language of the Mine Act itself, which he asserted mandates coverage, and has nothing to do with deference to the Secretary's interpretation of the Mine Act. Tr. 32, Oral Argument, June 28, 1989. It is not surprising that the Secretary eschews deference to her interpretation of this portion of the Mine Act since the Secretary's policy with respect to whether electric utilities come within Mine Act coverage has been exhibited in a variety of ways as follows:

1. Her implied interpretation that coal handling at electric power generating stations does not come within the Mine Act, based on her failure to assert such jurisdiction for approximately ten years after passage of the Mine Act.

1/ This position was advanced by the Secretary during oral argument before the Commission in Westwood Energy Properties v. Secretary of Labor, MSHA, PENN 88-42R, Tr. 26, June 28, 1989.

2. Her position as set forth in an earlier Commission case that:

> MSHA traditionally has not inspected power plants. Although the Secretary is not able to cite to a particular memorandum incorporating this policy, MSHA and its predecessors have consistently found the production of power to be outside the jurisdiction of the agency.
>
> MSHA has taken into account that a portion of the process utilized to produce electric power from coal requires handling and processing coal out has determined that those activities are subsumed in the specialized process utilized to produce electric power, and that the overall power plant process is more feasibly regulated by OSHA.

Utility Fuels Inc., Docket No. CENT 85-59 (Sec. Motion to Dismiss, November 29, 1985).

3. Her position that coal handling at electric utilities comes within coverage of the Mine Act, as asserted in this case.

4. Her position that coal handling at electric power generating facilities is governed by the OSHAct, as set forth in regulations recently proposed by OSHA for the operation and maintenance of electrical power generation facilities, which regulations include detailed provisions governing coal handling and processing at those facilities. 54 Fed. Reg. 4974-5024 (1989).

5. Her position that OSHA's proposed rules would apply only to electric generating facilities using already processed coal and that facilities using run-of-mine coal would be subject to Mine Act jurisdiction, as asserted by her counsel at oral argument before the Commission in this case. Tr. 24, 29, 33, Oral Argument, June 28, 1989. 2/

Because her interpretations have been neither longstanding nor consistent, any deference that would ordinarily be due to the Secretary in interpreting the Mine Act is not appropriate to this instance. See e.g., I.N.S. v. Cardozo-Fonseca, 480 U.S. 421 (1987); American Mining Congress v. EPA, 824 F.2d 1177, 1182 (D.C. Cir. 1987); Sec. v. Beth-Energy Mines, 11 FMSHRC 1445, 1451 (August 1989); Sec. v. Florence Mining Co., 5 FMSHRC 189, 196 (February 1983).

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2/ Since some conveyors in Penelec's operation transport coal that meets

the emission standards without further processing, those conveyors would, under this theory, presumably remain subject to OSHA jurisdiction rather than MSHA jurisdiction, a position that seems to belie that any consideration was given "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," as required by Section 3(h) of the Mine Act, 30 U.S.C. $802(h)(1).

I also view the Commission's holding today as inconsistent with our precedent. The Commission previously found that a commercial dock in which coal was stored, broken and crushed did not fall within the coverage of the Mine Act because the coal preparation was not done to "meet customers' specifications nor to render the coal fit for any particular use." MSHA v. Oliver M. Elam, Jr., Co., 4 FMSHRC 5, 8 (January 7, 1982). After noting that the Commission had concluded in Elam that the Mine Act requires an inquiry "not only into whether the operation performs one or more of the listed work activities [in section 3(i)], but also into the nature of the operation performing such activities," the Commission today avoids an examination of the nature of Penelec's operation and finds that, because the station's coal must meet "particular specifications and emissions requirements," an electric power generating plant is really a coal mine. Slip op. at 6. (emphasis in original).

I am unable to find any basis in either the statute or the legislative history for the distinctions made by either the Secretary (if the conveyor belt moves processed coal, OSHAct governs; if it moves run-of-mine coal, Mine Act governs) or the Commission majority (if coal processing is done other than to meet customer specifications, no. Mine Act coverage; if coal is processed to meet "particular specifications," Mine Act coverage) nor do I see that these distinctions have anything to do with the Mine Act's overall aim, which is to regulate the safety and health of miners. Rather, I think these artificial distinctions have arisen as a result of various words and phrases of Mine Act definitions having been examined in isolation, with no consideration being given to Congress' overall aim, and with no consideration being given to the Commission's language in Elam, supra, that requires inquiry into "the nature of the operation" as well as examination of the particular operations being performed. 3/ Had Congress wanted to regulate not only mines but electric power generating stations, steel mills and other coal consumers, I think it would surely have given some indication of that intent.

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3/ As noted by the United States Court of Appeals for the District of Columbia Circuit, statutes "must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emp. U. Local No. 73 v. N.L.R.B., 578 F.2d 361, 366 (D.C. Cir. 1978). In the same vein, Judge Learned Hand observed that "the duty of ascertaining [the] meaning [of a statute] is difficult at best and one certain way of missing it is by reading it literally..." See Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 {2d Cir. 1963).

In determining what constitutes a "coal mine" as defined by the Mine Act, the majority also dismisses out of hand the precedential value of any cases decided under the Black Lung Benefits Act. 30 U.S.C. 901 et seq. (1982). I do not believe those cases can be so lightly dismissed. The majority has determined that these cases lack precedential value because "black lung benefits are financed by a trust, funded by a tax on 'coal sold by producers,'" whereas "the Mine Act's goal is to assure safe and healthful working conditions for the nation's miners." Slip op. at 8, n. 7. "Under the Mine Act 'coal mine' is defined in broad terms to better effectuate the salutory effects of that goal." Slip op. at 8, n. 7. In fact, the definition of "coal mine" set forth in section 3(i) of the Mine Act specifically applies not only to the Mine Act but also to the Black Lung Benefits Act. I find nothing in the Mine Act, the Black Lung Benefits Act or the legislative history that suggests the term is to be construed differently for purposes of determining Mine Act coverage than in determining Black Lung benefits coverage. And while the majority quotes the court in Stroh v. Director, Office of Workers' Compensation Programs, 810 F.2d 61 (3d Cir. 1987) to the effect that the function of a miner seeking black lung benefits should be "integral to the ... preparation of coal, not ancillary to the delivery and commercial use of processed coal" (slip op. at 8, n. 7) as additional evidence of the irrelevance of the Black Lung cases, I view the test developed by the Stroh court and other courts for eligibility for Black Lung benefits as quite relevant in determining when an operation falls within the definition of a "coal mine" as set forth in the Mine Act. 4/ In fact, the United States Court of Appeals for the Third Circuit, in deciding a black lung case, made specific reference to its earlier holding in Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), a Mine Act case as authority for its construction of the terms "coal mine" and the "work of preparing coal." Dowd v. Director, OWCP 846 F.2d 193, 195 (3d Cir. 1988).

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4/ The test set forth is Stroh and earlier cases for determining eligibility for black lung benefits involves a two-prong test, the first being a "situs" test, which requires work in or around a coal mine or coal preparation facility and has required the courts to construe the terms "coal mine," and "work of preparing coal" as defined in section 3 of the Mine Act. The second prong is the "function" test referred to by the majority, which require that the claimant's job be "integral to the extraction or preparation of coal, not ancillary to the delivery and commercial use of processed coal." It should be noted that, if one agrees with the Secretary and the majority that Penelec's operations include "coal preparation," those of Penelec's employees who work in such preparation would fall within the definition of "miner" set forth in the Black Lung Benefits Act, i.e., "... any individual who works or has worked in or around a ... coal preparation facility in the ... preparation of coal."

30 U.S.C. 902(d).

The Secretary also asserts that the Black Lung cases are f no avail to Penelec because they involve "the handling of coal that already had been prepared.' Sec. br. at 14. I believe the Secretary misreads those cases. In the cases to which she refers the courts have made the determination, as part of their construction of the terms "coal mine" and "the work of preparing coal," that once coal has entered the stream of commerce or reached the ultimate consumer, coal preparation has been completed and that, thus, the facilities at which those claimants worked did not fall within the definitions of "coal mine" or "work of preparing coal" set forth in sections 3(h) and 3(i) of the Mine Act. Based on their determination that the term "coal preparation" was much narrower in scope, the claimants were found ineligible for benefits. In Eplion v. Dir., OWCP, 794 F.2d 935 (4th Cir. 1986), cited by the Secretary, the mine operator washed coal for a second time because of dust complaints. Because the washing was "not necessary for processing of the coal into its marketable form," the court declined to extend the definition of a "coal mine" to include that facility. Eplion v. Director, OWCP, supra, at 937. (emphasis added). Likewise, the court in Southard found that the "preparation of coal occurs precedent to its retail distribution and consumption." Southard v. Director. OWCP. 732 F.2d 66, 69 (6th Cir. 1984). Accord Director, OWCP v. Ziegler Coal Co., 853 F.2d 529, 536 (7th Cir. 1988); Johnson v. Weinberger, 389 F. Supp. 1296 (S.D. W.VA. 1974).

Also, as noted by the Secretary, the Third Circuit in Dowd, found the claimant to be a miner, but in so doing stressed that "the claimant's employer ... does not consume the coal, and does not utilize coal to produce a product other than coal." Dowd, supra, at 195. As further noted by the Secretary, the court in Stroh found the claimant to be a miner but also emphasized that the "processing plant to which Stroh delivered was not an ultimate consumer..." Stroh, supra. at 64. Similarly, the Fourth Circuit in Roberts v. Weinberger found the claimant to be a miner, stating that coal is extracted and prepared when it is "in condition for delivery to distributors and consumers." Roberts v. Weinberger, 527 F.2d 600, 602 (4th Cir. 1975). These cases, while not affirmatively holding that coal consumers do not fall within the definition of "coal mine," expressly limit their holdings to facilities that are not coal consumers.

As noted above, I believe that, while the definition of "coal mine" as set forth in the Mine Act is to be broadly interpreted, the interpretation is not without limitations. I am of the opinion that the plain language of the statute does not bring Penelec's operation within coverage of the Mine Act, that the legislative history does not suggest the breadth of coverage asserted by the Secretary and that the

Secretary's interpretation, as set forth in this case, is not entitled to deference. In addition, I am not convinced that ultimate consumers, engaged in the production of a product other than coal are subject to Mine Act jurisdiction.

For the foregoing reasons, I would reverse the judge and dismiss the case against Penelec.

Distribution

John P. Proctor, Esq.
Scott W. Clearwater, Esq.
Timothy N. Atherton, Esq.
Bishop, Cook, Purcell & Reynolds
1400 L Street, N.W.
Washington, D.C. 20005

Carl C. Charneski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Stephen C. Yohay, Esq.
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041