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MSHA V. LANCASHIRE COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 11, 1991

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION MSHA)

v.

LANCASHIRE COAL CORP.

Docket Nos. PENN 89-147-R
PENN 89-148-R
PENN 89-149-R
PENN 89-192-R
PENN 89-193-R
PENN 90-10

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson Commissioners

DECISION

BY: Holen and Nelson, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) (the "Mine Act" or "Act"), and involves the validity of three citations and two withdrawal orders issued to Lancashire Coal Company ("Lancashire") concerning conditions at its coal preparation plant at the Lancashire No. 25 Mine. The question before us is whether the Department of Labor's Mine Safety and Health Administration ("MSHA") properly issued citations and withdrawal orders to Lancashire under the Mine Act. Commission Administrative Law Judge George A. Koutras upheld the Secretary's action in proceeding against Lancashire under th Mine Act. 12 FMSHRC 272 (February 1990)(ALJ). Lancashire petitioned for review of that part of the judge's decision holding that the cited working conditions were subject to Mine Act jurisdiction. Lancashire did not petition for review of the judge's rulings with respect to the merits of the withdrawal orders and citations. For the reasons that follow, the judge's decision is affirmed. 1/

1/ The Commission's vote in this case is evenly split. Acting Chairman Backley and Commissioner Doyle would reverse the judge's decision and

Commissioners Holen and Nelson would affirm. For the reasons set forth in Pennsylvania Electric Co,, 12 FMSHRC 1562, 1563-65 (August 1990), pet. for review filed, No. 90-3636 (3rd Cir. Sept. 17, 1990), we conclude that the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

The parties stipulated to most of the key facts in this case. The stipulations that are relevant to this review proceeding are as follows:

1. The subject work site, Lancashire Coal Company Preparation Plant ("the work site") is located in Elmora, Cambria County, Pennsylvania, and is owned by the Inland Steel Company ("Inland"), which has an office in East Chicago, Indiana.

2. The work site is adjacent to a sealed mine facility which is owned by Inland and which is known as the Lancashire Coal Company No. 25 Mine ("Lancashire Mine #25").

3. No coal has been mined at Lancashire Mine #25 since June 3, 1983.

4. Until June 3, 1983, the Lancashire Mine #25 was an active, producing underground coal mine with surface coal preparation facilities located adjacent to it on the site ("the Lancashire Coal Company Preparation Plant").

5. On April 17, 1986, the underground mine shafts were sealed by the operator. At that time, the mine operator was Inland Steel Coal Company.

6. Since the mine shafts were sealed, the surface facilities have been inactive with the exception of a small water treatment facility.

7. On September 30, 1986, the MSHA classification of the mine was changed to a surface facility as a result of the underground openings being sealed.

8. During fiscal years 1987 and 1988, the work site was inspected by MSHA as a surface facility. Prior to March 20, 1989, the last MSHA safety and health inspection was April 1, 1988.

9. On September 6, 1988, the Hastings Field Office of MSHA declared the work site permanently abandoned (Joint Exhibit 1).

10. As a result of the action it took on September 6, 1988, MSHA ceased inspection activity at the work

site.

11. After September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal.

12. In late 1988, Lancashire sought bids from contractors to perform work dismantling and removing facilities and structural materials from the work site and reclaiming the area.

13. K&L Equipment Co., Inc. ("K&L"), owned by Kenneth Morchesky, was selected as the contractor and commenced work the week of February 20, 1989.

14. On March 20, 1989, a fatal accident occurred at the work site. One of K&L's employees was killed during operations to raze a silo at the site.

15. On March 21, 1989, MSHA Inspector William D. Sparvieri, Jr, arrived at the work site to conduct an inspection. As part of his activities at the work site on March 21, 1989, Mr. Sparvieri issued the following citations and orders:

a.Section 103(k) Order No. 2888399, 3:00 p.m.

b.Section 107(a) Order No. 2888400, 3:15 p.m.

c.Section 104(a) Citation No. 2891501, 3:30 p.m.

16. On April 17, 1989, Inspector Sparvieri returned to the work site and served Citation Nos. 2891508 (1:55 p.m.) and 2891509 (2:00 p.m.). 12 FMSHRC at 274-75 (Stipulation numbers changed).

Lancashire's No. 25 Mine and associated coal preparation facilities stopped producing or preparing coal on or about June 3, 1983. Subsequently, when Lancashire was unable to sell the mine, it sealed the mine's openings. Lancashire decided to demolish its old concrete coal storage silo and old coal preparation plant (screen house) in late 1988. Under Pennsylvania law, a mine operator is required to reclaim abandoned mine lands, including the lands upon which former preparation facilities are located. The Pennsylvania Department of Environmental Resources ("Pennsylvania DER") requires that surface facilities be removed as part of the reclamation process. The coal preparation facilities in question were built in the late 1950's and were not used after 1971, because new coal preparation and storage facilities were built in an adjacent area.

MSHA continued to inspect the surface facilities until September 1988, at which time MSHA classified the mine as "permanently abandoned." The only continuing activity at the mine site was the operation by Lancashire of a water treatment facility required by the Pennsylvania DER. Only one

Lancashire employee worked at the mine site, supervisor Francis Falger.

Lancashire engaged an independent contractor, K&L Equipment Company, Inc. ("K&L"), to demolish the old coal storage silo and old screen house. On March 20, 1989, during the demolition of the old coal storage silo, an employee of the independent contractor was killed when a portion of the silo prematurely collapsed, crushing him under concrete, coal and other material. Local fire and rescue authorities transported the victim to a local hospital.

MSHA started its investigation the following day. The record does not reveal how MSHA learned of the accident. Francis Falger admitted the MSHA inspectors onto the property but told them that MSHA was without jurisdiction because the mine had been classified by MSHA as "permanently abandoned." Kenneth Morchesky of K&L also told the inspectors that MSHA was without jurisdiction. The MSHA supervisory inspector, John Kuzar, replied that he was not sure if MSHA had jurisdiction but that MSHA was going to investigate the accident. Flager and Morchesky fully cooperated with MSHA Supervisory Inspector Kuzar and MSHA Inspector William Sparvieri, Jr., who was assigned to investigate the accident.

After spending about an hour at the accident site, the inspectors returned to the local MSHA office so that Inspector Kuzar could call the MSHA subdistrict manager to discuss the jurisdiction issue raised by Lancashire and K&L. Although the jurisdiction question was not resolved at that time, the inspectors were authorized to return to the Lancashire site to secure the area. Inspector Sparieri issued an order of withdrawal under section 103(k) 2/ of the Mine Act, in order to secure the area, and an order of withdrawal under section 107(a) 3/, because he believed that the structures

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2/ Section 103(k) of the Mine Act states:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. 813(k).

3/ Section 107(a) of the Mine Act states in part:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring

to be demolished were in an unstable condition and presented an imminent danger to anyone in the area. Additionally, he issued Lancashire a citation pursuant to section 104(a) of the Act. Inspector Sparvieri also issued the independent contractor citations and orders, which were not contested before the Commission.

On March 23, 1989, MSHA District Manager Donald Huntley wrote a memorandum to Jerry Spicer, MSHA Administrator for Coal Mine Safety and Health, concerning MSHA's jurisdiction at this facility. The memorandum stated that the MSHA district office "determined that both the mine operator and contractor fell under MSHA's jurisdiction and all applicable provisions of the Act and Title 30 Code of Federal Regulations applied."

On April 17, 1989, Inspector Sparvieri returned to the mine site to issue two additional citations under section 104(a) of the Act. Apparently, the MSHA subdistrict office had received notification from MSHA's Arlington, Virginia, headquarters that MSHA has jurisdiction over the Lancashire site. In a memorandum to Jerry Spicer dated May 2, 1989, Edward Clair, Associate Solicitor of the Department of Labor, concluded that MSHA had jurisdiction and that "MSHA should plan to conduct appropriate inspection activities of K&L's activities at the Lancashire site."

In his decision, Judge Koutras concluded that "the mine site where the reclamation or demolition work in question was taking place in this case is a 'mine' within the definitional language found in sections 3(h)(1) and 3(h)(2) of the Act, and that at the time of the inspections in question MSHA had enforcement jurisdiction and authority over that mine facility." 12 FMSHRC 295. The judge based his decision on an analysis of the text of the Mine Act, the legislative history, and Commission precedent.

Relying on the language of section 3(h) of the Mine Act , and the

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> the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist....

30 U.S.C. 817(a).

Section 3(h) of the Mine Act states in part:

(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

legislative history, the judge concluded that the structures being demolished were the result of the prior active mining of coal, including extraction and processing, and therefore fit within the statutory definition of "coal or other mine." 12 FMSHRC ar 292. He concluded that since coal from the previously active underground mine was processed through these structures, one could reasonably assume that a "nexus" existed between the coal that was extracted from the underground mine and the coal that was prepared through these structures. 12 FMSHRC at 293. He held that the fact that these structures had not been used since 1971 was immaterial since the definition of "coal or other mine" is not related to any time factor and since the definition has consistently been given the broadest possible interpretation by the courts as well as the Commission. Id. The judge relied upon the Commission's decisions in Alexander Brothers, 4 FMSHRC 541 (April 1982), and Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), in reaching his conclusion. The judge also rejected Lancashire's contention that MSHA's decision to stop inspecting the mine site removed it from the statutory definition of "coal or other mine. 12 FMSHRC at 291.

II.

Disposition of Issues

We conclude that the Secretary had jurisdiction to inspect Lancashire's preparation plant under the Mine Act because this facility fits within the Mine Act's definition of "coal or other mine." 30 U.S.C. 802 (h)(1). Our resolution of Mine Act jurisdiction in this case is governed by the statute and our interpretation is further clarified by its legislative history and by the Commission's decisions. Congress directed the Commission to "give

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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 subchapters [titles] II, III, and IV of this chapter [Act], "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).

weight" to the Secretary's interpretation of the Mine Act. 5/ For the reasons set out below, we believe that the Secretary's reading here of the definition of "coal or other mine" is correct, even if her reading were not entitled to be given weight. We first set forth the basis for this conclusion and then address other issues raised by Lancashire and the dissenting opinion.

A. Definition of "coal or other mine."

Lancashire argues that the only definition of a coal mine applicable in this case is contained in section 3(h)(1) of the Mine Act, 30 U.S.C. 802 (h)(1). Lancashire contends that the only relevant portion of thi definition is contained in part (C), which provides, in pertinent part:

> "coal or other mine" means ... (C) lands ... structures, facilities, equipment, machines, tools, or other property ... used in, or to be used in ... the work of preparing coal.

30 U.S.C. 802(h)(1) (emphasis added). Lancashire maintains that the definition includes lands and facilities resulting from the work of extracting minerals from their natural deposits but does not include lands and facilities resulting from the work of preparing coal. 6/ Thus, it argues that because the structures that were demolished and the land on which they were located resulted from the work of preparing coal, rather than the work of extracting minerals from their natural deposits, the work site was not a "coal or other mine" and MSHA was without jurisdiction. It maintains that the definition of "coal or other mine" evidences a Congressional intent to treat facilities resulting from the extraction of coal differently from facilities resulting from the preparation of coal.

Lancashire contends that Judge Koutras improperly supplemented the definition of "coal or other mine" with the definition of "coal mine"

5/ The legislative history of the Mine Act provides that "the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts," S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637 (1978) ("Lee's Hist.").

6/ Section 3(i) of the Mine Act provides:

> "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;

30 U.S.C. 802(i).

contained in section 3(h)(2), which by its own terms is only applicable to titles II, III and IV of the Mine Act. It argues that by incorrectly relying on an inapplicable definition of coal mine, Judge Koutras made the "key limitations" in Section 3(h)(1) "disappear." Lancashire Br. 16.

Lancashire also contends that by confusing the two definitions, the judge improperly found a "nexus" between the extraction and preparation of coal and treated the two activities as though they were one and the same. It states that since the definition in section 3(h)(1) uses the disjunctive "or" to separate the two activities, the definition affords the two activities differing treatment.

The Secretary explains that the two definitions of coal mine in section 3(h) confer Mine Act jurisdiction over property, structures and facilities used in, to be used in, or resulting from the work of extracting or preparing coal. She states that this broad definition is consistent with Congress' intent that the term "mine" be construed expansively as demonstrated by the legislative history of the Act.

The Secretary argues that Lancashire's construction of the definitions in section 3(h) is inconsistent with other provisions of the Mine Act, is contrary to Congressional intent, and is formalistic and at odds with the obvious purpose of the Mine Act. She asserts that the definitions in section 3(h) must be read together. She maintains that the qualifying language of the definition of "coal mine" contained in section 3(h)(2) evidences Congress' recognition that titles II, III and IV of the Mine Act are applicable to coal mines only and not to metal or other mines. She states that Congress did not intend to create two conflicting definitions of coal mine in the same statute.

The Mine Act contains two definitions applicable to coal mines in section 3(h). The definition of "coal mine" contained in section 3(h)(2) is identical to the definition that was in section 3(h) of the Coal Mine Health and Safety Act of 1969 ("Coal Act") except for the addition of the qualifying phrase "For purposes of titles II, III, and IV." The Mine Act amended the Coal Act. The definition of "coal or other mine" contained in section 3(h)(1) of the Mine Act is taken from the definition of the term "mine" contained in section 2(b) of the Federal Metal and Nonmetallic Mine Safety Act ("Metal Act"), 30 U.S.C. 721 (1976) (repealed). The Metal Act was repealed by the Mine Act.

The Metal Act definition was modified in section 3(h)(1) of the Mine Act as follows:

(A) an area of land from which minerals are extracted

in non-liquid 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

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> 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.

The underscored phrases in the above definition were not contained in the Metal Act definition and were added by Congress when it passed the Mine Act. The phrase "or to be used in, or resulting from" was added before the words "work of extracting such minerals," while the phrase "or to be used in" was added before the words "the work of preparing coal." It is this disparity that is the crux of Lancashire's argument. Lancashire contends that since the structures to be demolished in this case "resulted from" the work of preparing coal, and were not "used in" or "to be used in" such work at the time of the inspection, these structures do not fit within the Act's definition.

Section 4 of the Mine Act provides that each "coal or other mine" that affects commerce is subject to the Act, 30 U.S.C. 803. Thus, if the preparation plant at the Lancashire No. 25 Mine is a "coal or other mine" that ends the question because the Secretary has Mine Act jurisdiction over any "coal or other mine."

The fact that the Mine Act contains two somewhat different definitions of covered mining operations and that these definitions are somewhat complex create enough ambiguity to warrant consideration of the legislative history in interpreting these provisions. Burlington Northern R. Co. v. Okla Tax Comm'n, 481 U.S. 454, 461 (1987)("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity"). The legislative history, particularly the Senate and House Committee reports, indicate that Congress intended that the definition of the term "coal or other mine" be given a broad interpretation and that any doubts be resolved in favor of inclusion of the facility within the coverage of the Act. More specifically, both Committee reports indicate that Congress intended to treat facilities resulting from the preparation of coal the same as facilities resulting from the extraction of minerals. The legislative history provides no support for Lancashire's position that Congress deliberately excluded from the definition of "coal or other mine" surface structures resulting from the preparation of coal.

When the Senate version of the bill that became the Mine Act was reported by the Committee on Human Resources, the Committee Report described the definition contained in section 3(h)(1) as follows:

[T]he 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 numerated in the definition of mine under the Coal Act ... . 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 possibl[e] 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. 181, 95th Cong, 1st Sess 14, (1977), reprinted in Legis. Hist. at 602 (emphasis added). It is not clear why the Committee did not include the language "or resulting from" when referring to the work of preparing coal as it did in the Committee Report. This definition remained unchanged when it passed the Senate. Legis. Hist. at 1109.

When the House version of the bill was reported by the House Committee on Education and Labor, the second definition of "coal mine" was added in what is now section 3(h)(2), while the definition in subsection (h)(1) was similar to the definition in the Senate bill. Legis. Hist. at 343-44. The House Committee Report provided the following explanation:

> Section 102(b)(2) amends the definition of "Mine" to read "coal or other mine and to include (1) an area of land from which minerals are extracted in non-liquid form, or if in liquid form are extracted with workers underground; (2) private ways and roads appurtenant to such area; and (3) lands, passageways, facilities, etc., to be used in or resulting from the work of extracting minerals, including custom coal preparation facilities and milling operations....

H. Rep. No. 312, 95th Cong, 1st Sess. 28 (1977), reprinted in Legis. Hist. at 384 (emphasis added). The Committee Report does not state why the Committee did not include the language "or resulting from" in the definition in section 3(h)(1) in reference to the work of preparing coal. The definitions of "mine" in this bill remained unchanged when the bill passed the House, Legis. Hist. at 1261.62.

The two bills were referred to a conference committee. This committee adopted the House bill for purposes of section 3(h). The

following explanation is provided in the Conference report:

> Both the Senate bill and the House amendment modified the Coal Act to make it the single mine safety and health law, applicable to all mining activity. The Senate bill did this by deleting the word "coal" where applicable in title I. The House

> amendment did this by inserting the words "or other" after the word "coal" where applicable. Thus, the Senate bill referred to "mines, the House amendment to "coal or other mines."

The conference substitute conforms to the House amendment. The conferees note that the foundation for the new Mine Safety and Health Act is the Federal Coal Mine Health and Safety Act of 1969. In adopting the provisions of that Act, titles II, III, and IV are retained as exclusively applicable to the coal mining industry. For this reason, it was the decision of the conferees that the use of the term "coal or other mine" in titles I and V, which are applicable to all mining activity, would more clearly delineate the distinction between those titles of the act applicable to all mining and those applicable to coal mining only.

S. Conf. Rep. No. 461, 95th Cong, 1st Sess. 37 (1977), reprinted in Legis. Hist. at 1315.

As discussed above, the Mine Act's definitions in section 3(h) are patterned after the definitions in the Metal Act and Coal Act. It appears to us that the definition of "coal mine" in subsection 3(h)(2) was included, in major part, to make clear that titles II, III and V, which contain coal mine safety and health standards and black lung provisions, are not applicable to metal or nonmetal mines. The term "coal mine" is used in those titles but not in titles I and V. When Congress was considering the bills that became the Mine Act, a critical concern was whether the Secretary would attempt to apply coal mine safety and health standards to noncoal mines, such as sand and gravel pits. Much of the debate centered on this concern. See, e.g., Legis. Hist. at 999.1024, 1056-63, 1161-78, 1231-35. The restriction in the definition of "coal mine" was intended to allay these fears. See Conference Committee Report, supra. As a consequence the term "coal mine" rather than the term "coal or other mine" is used in titles II, III and IV. It does not appear, nor can we credit the contention, that Congress intended to provide an inconsistent definition for coal mines applicable to titles I and V. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent." 2A Sutherland Statutory Construction, 4 .05, at 90 (Sands 4th ed. 1984 rev.) Consequently, the two definitions should be construed in a way that harmonizes them. Id.

Lancashire admits that the definition of "coal mine" in section 3(h)(2) of the Mine Act "covers structures resulting from the preparation of coal." Lancashire Br. 16. With the exception of the introductory phrase, this definition is the same definition that was in the Coal Act. Thus, Lancashire's work site would have been subject to the jurisdiction of the

Coal Act. It is clear that Congress did not intend to reduce the scope of the government's authority when it passed the Mine Act. Congress stated that section 3(h) of the Mine Act "contains amendments to the definitions in the Coal Act, which reflect ... the broader jurisdiction of the[e] [Mine] Act."

S. Rep. No. 181, supra at 14, reprinted in Legis. Hist. at 602 (emphasis added); Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1554 (D.C. Cir. 1984). 7/

The dissenting opinion concludes that persons engaged in demolition at a mine site such as Lancashire's are not miners. But, the term "miner" is defined broadly in the Act, as "any individual working in a coal or other mine." 30 U.S.C. 802(g). The term "operator" is defined in the Act to include those performing services or construction at mines. 30 U.S.C. 802(d). Thus, a construction worker, elevator mechanic, laborator technician or clerk typist working at a mine is a "miner" under the Act. See e.g., Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285 (D.C. Cir. 1990); Martha Perando v. Mettiki Coal Corp., 10 FMSHRC 491 (April 1988). Further, the Secretary has defined the term "miner" for purposes of hazard training regulations for surface facilities as "any person working in a surface mine or surface areas of an underground mine ... includ[ing] any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine." 30 C.F.R. 48.22(a)(2).

Based on the language of the Mine Act and the legislative history, we conclude that the facilities at issue at the Lancashire No. 25 Mine fit within the definition of "coal or other mine" as set forth in section 3(h)(1) of the Mine Act. We reject Lancashire's attempt "to give the Mine Act a technical interpretation at odds with its obvious purpose," Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987).

B. Nature of the operation

Lancashire maintains that even if its work site fits within the definition of "coal or other mine," MSHA was without jurisdiction to inspect it because the nature of the operation was not similar to work usually performed by a mine operator. It contends that the demolition and removal of the structures in question from the abandoned mine site were not closely associated with active coal mining. Lancashire argues that the Commission's decision in Oliver M. Elam, Jr., 4 FMSHRC 5 (January 1982), recognizes that an activity does not fall within the coverage of the Mine Act unless the nature of the operation in question is similar to work normally performed by a mine operator.

In Elam, the question presented was whether a commercial dock facility that arguably performed several of the functions included in the Mine Act's definition of "work of preparing the coal" was subject to MSHA jurisdiction.

7/ Consistent with the thrust of this legislative history, the federal courts have uniformly recognized the extensive reach of the term "coal or other mine," E.g., Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979)("the statute makes clear that the concept that was to be conveyed by the word ["mine"] is much more encompassing than the usual meaning attributed to it"); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116. 1118 (9th Cir. 1981).

Having examined the activities carried out at Elam's dock, the Commission concluded that "all of Elam's activities with respect to coal relate solely to loading it for shipment." 4 FMSHRC at 6. The Commission held that "inherent in the determination whether an operation properly is classified as 'mining' is an inquiry not only into whether the operation performs one or more of the listed work activities [in the definition of 'work of preparing the coal'], but also the nature of the operation performing such activities." Elam, 4 FMSHRC at 7 (emphasis in original). 8/

Elam is distinguishable from the present case. If the Lancashire facilities being demolished were still in use, they would be the kind of facilities at which activities within the definition of "work of preparing the coal" would be performed and, as a consequence, would be within the definition of "coal or other mine." Lancashire admits that the facilities in this case "undeniably were designed for and used in the 'work of preparing the coal,' as that term is defined in the Mine Act." Lancashire Br. 11. Thus, the work performed at the facilities at issue at the time the mine was operating was the "work of preparing ... coal as is usually done by the operator of the coal mine." See section 3(i) of the Act. The physical setting in this case is easily recognizable as a mine, while Elam's commercial dock on the Ohio River is not.

Elam applies when an operation is performing some functions normally associated with coal preparation, such as sizing and crushing, at a location separate (and different) from a traditional mine site. See, e.g., Mineral Coal Sales, Inc., 7 FMSHRC 615, 619,20 (May 1985). The issue there is whether such activities are sufficient to be deemed the "work of preparing the coal" so that the operation should be considered to be a mine. In contrast, the issue in the present case is whether demolition activities in aid of reclamation at a former preparation plant located on a mine site are within the statute's coverage. Whether the demolition activities constitute the "work of preparing the coal" is not an issue here.

Lancashire also refers to the judge's finding that the demolition of the structures at issue was not closely related to activities normally associated with active coal mining. The judge made this finding, however, in reaching his conclusion that Lancashire was not required by 30 C.F.R. 77.1712 to notify MSHA that it was reopening the mine. The judge determine that in order

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8/ In the present case, the judge considered the Commission's decision in Alexander Brothers in reaching the conclusion that Lancashire's work site was subject to MSHA jurisdiction. 12 FMSHRC at 293. In Alexander Brothers, the Commission applied Elam and concluded that the removal and screening of coal and foreign debris from a refuse pile at an abandoned mine site

constituted the work of preparing the coal. 4 FMSHRC at 545. The judge noted that although the work being performed by the operator in Alexander Brothers differed from the work performed by "the ordinary preparation plant," the Commission determined that it was subject to the jurisdiction of the Coal Act. 12 FMSHRC at 293. Thus, in applying Alexander Brothers to the facts of this case, the judge analyzed the nature of Lancashire's operation and determined that it was subject to MSHA jurisdiction.

to establish a violation of section 77.1712, there must be "some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining [or preparation] of coal." 12 FMSHRC at 303. As a consequence, he vacated the citation. The judge's finding in this regard does not support Lancashire's argument that MSHA was without jurisdiction.

Other activities at a mine site that do not occur at the same time as the extraction or preparation of coal are subject to MSHA jurisdiction. For example, the construction of buildings or other structures at a mine site is subject to MSHA inspection, even if the extraction of minerals has not yet begun. 30 U.S.C. 802(d); See also, e.g., Bituminous Coal Operators' Association v. Secretary, 547 F.2d 240 (4th Cir. 1977). Nothing in the Mine Act, the legislative history or Elam suggests that MSHA is without jurisdiction to inspect a particular activity at a "coal or other mine" simply because such activity is not contemporaneous with the active extraction or preparation of coal or other minerals.

Moreover, even applying Elam's "nature of the operation" test, Lancashire's position is undercut by its acknowledgment that "operators have a duty to tear down above ground structures as part of the state-mandated reclamation of a permanently abandoned facility." Lancashire Br. 25, n.17. As a consequence, Lancashire effectively concedes that the normal mining process may include the demolition of surface facilities at a coal mine after such mine is closed. To borrow a phrase from section 3(i) of the Act, the demolition of surface facilities at a coal mine constitutes work "usually done by the operator of the coal mine" once the ore body is depleted or mining is halted for other reasons. While demolition is not always associated with active mining, it is related to the overall process of mining coal.

C. Additional Issues

Lancashire contends that a memorandum written by Associate Solicitor Edward Clair, referred to as the "Huntsville Gob memorandum" supports its position that its reclamation activities were not subject to MSHA jurisdiction. In that memorandum, Mr. Clair determined that reclamation work occurring at another site was not subject to Mine Act jurisdiction. He listed a number of factors that should be evaluated when MSHA determines whether it has jurisdiction over work occurring on previously mined lands.

The Huntsville Gob memorandum does not purport to be a statement of MSHA policy nor does the Secretary state that it is. The contents of the memorandum were not promulgated either as interpretative rules or enforcement guidelines. Rather, the memorandum is an internal document that supports MSHA's decision not to assert jurisdiction over a particular facility at a

particular time. Indeed, Mr. Clair had determined that MSHA did have jurisdiction over Lancashire's preparation plant in another memorandum, referred to above, two weeks earlier. The Commission has previously determined that resolution of the question of jurisdiction "is governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct." Alexander Brothers, 4 FMSHRC at 543. In any event, the Commission has previously concluded that inconsistent enforcement policies

of the Secretary are not necessarily dispositive of whether a violation
occurred but bear on the degree of negligence of an operator and in
assessing a civil penalty. King Knob, 3 FMSHRC 1417, 1422 (June 1981).

Lancashire, and the dissenting Commissioners, contend that Lancashire's
activities were covered by the Occupational Safety and Health Act of 1970,
29 U.S.C. 651 et seq. (1988)("OSHAct"). The OSHAct applies to a workplace
unless another federal agency "exercise[s] statutory authority to prescribe
or enforce standards or regulations affecting occupational safety or health."
29 U.S.C. 653(b)(1). When another federal agency has actually exercised
its statutory authority to regulate a workplace, the OSHAct does not apply.
E.g., Southern Rv. Co. v. Occupational Safety and Health Review Comm.,
539 F.2d 335, 336 (4th Cir. 1976). The Mine Act empowers an MSHA inspector
to issue a citation or order of withdrawal to any "operator" that violates
the Mine Act or a MSHA regulation. (The term "operator" is defined in section
3(d) of the Mine Act as "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).)
Thus, "with regard to health and safety in the workplace, the Secretary
regulates an employer falling within the Mine Act definition of an operator
under that Act, while she regulates an employer not so classified under the
OSHAct." Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1287
(D.C. Cir. 1990). In this case, the Secretary exercised her inspection
authority under the Mine Act. The Secretary has never attempted to regulate
the safety and health conditions at Lancashire under the OSHAct. 9/

The dissenting Commissioners emphasize that Circuit Court holdings in
Southern Rv, Co. and in Columbia Gas of Pennsylvania v. Marshall, 636 F.2d
913 (3rd Cir. 1980) would require the issuance of explicit demolition
regulations to establish MSHA jurisdiction in this case. But under their
rationale, consequences would ensue that are at variance with Congressional
intent. OSHA, for example, would be given jurisdiction over demolition at
a mine site even when coal was being extracted at the same time, because
MSHA would not be able to show that it had promulgated specific demolition
regulations.

These cases, moreover, may be distinguished. In Southern Rv. Co., as
in other cases with similar holdings, the court required a showing of
specificity

9/ In Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989), and
Westwood Energy Properties, a majority of the Commission determined that
MSHA had jurisdiction over certain facilities but were unable to determine
whether the Secretary had, in fact, chosen to exercise her authority to
regulate them under the Mine Act instead of the OSHAct. In each case,

both the Occupational Safety and Health Administration ("OSHA") and MSHA had asserted jurisdiction over the operation in question. These cases were remanded to the judge to determine whether the Secretary had properly invoked Mine Act jurisdiction. As OSHA has never attempted to assert jurisdiction over any facility associated with the Lancashire operation, holdings in Pennsylvania Electric and Westwood are not applicable to this case.

in an agency's regulations in order to establish grounds for preemption or exemption from OSHA's residual regulatory authority. At issue in this case is the Secretary's direct assertion of statutory authority for MSHA. This is not a case where OSHA has asserted authority and where that authority is being challenged. This is not a case where OSHA's residual regulatory authority derives from a lack of exercise of regulatory authority by another agency.

Southern Rv. Co. and other cases with similar holdings may be further distinguished in that the jurisdictional question at issue in those cases lies between separate departments or agencies, rather than within a single cabinet. level department, under a single Secretary, as in this case. A jurisdictional question may be resolved with greater ease when it falls within the authority of one Secretary. The Secretary of Labor, in regulating Lancashire's demolition activities under the Mine Act rather than the OSHAct, is "not determining the outer limits of [her] own authority, but [is] merely 'adjusting the administrative burdens between [her] various agencies,'" Otis Elevator, 921 F.2d at 1288 n. 1 (quoting Carolina Stalite, 734 F.2d at 1553). Lancashire is "unquestionably subject to regulation by the Secretary under one Act or the other." Otis Elevator. 921 F.2d 1288 n. 1.

Lancashire's final argument is that MSHA's jurisdiction over its coal preparation plant ceased when MSHA stopped inspecting it in September 1988. It contends that MSHA stopped inspecting the facility because MSHA determined that the facility was no longer a mine subject to its jurisdiction. Lancashire maintains that it did not reestablish itself as a mine subject to MSHA jurisdiction when it demolished the structures because it took no action, after MSHA declared the mine to be "permanently abandoned," to resume the extraction or preparation of coal.

Lancashire argues that MSHA has taken the position that such reclamation activities at abandoned mines are not subject to the jurisdiction of the Mine Act. Lancashire points to the testimony of MSHA Inspector Leroy Niehenke and retired Inspector Thomas Simmers in addition to the Huntsville Gob memo. The two inspectors stated that they have never known MSHA to attempt to exercise jurisdiction over demolition work being performed as part of reclamation at a "permanently abandoned" facility. In addition, Morchesky (the independent contractor) testified that he performed similar work at another abandoned mine site in the area (Barnes & Tucker No. 20) with the knowledge of MSHA and that MSHA never attempted to assert jurisdiction over this work.

The Secretary responds that it is irrelevant whether the mine was reopened to extract or prepare coal, or to demolish surface mine facilities. She maintains that MSHA's "permanently abandoned" classification is for administrative convenience to conserve inspection resources and that such

classification does not divest MSHA of jurisdiction if new work is commenced at the site. We note that the inspection occurred less than seven months after MSHA classified the mine as "permanently abandoned."'

Neither party disputes that MSHA would have jurisdiction at a mine previously classified as "permanently abandoned" if the operator took actions to recommence the extraction or preparation of coal. What is contested is whether MSHA has jurisdiction at a site previously mined when old surface coal

preparation facilities are demolished. Lancashire asserts with no authoritative basis that MSHA's jurisdiction at a "permanently abandoned" mine can begin again only if steps are taken to resume the extraction or preparation of coal.

We believe that the Mine Act's definition of "coal or other mine" subjects Lancashire's preparation plant to Mine Act jurisdiction. The Secretary cannot be prevented from asserting Mine Act jurisdiction at the Lancashire operation simply because she may not have exercised such jurisdiction at other locations. In resolving questions of jurisdiction, the Commission must be guided by Congressional intent. Consistent policy and enforcement, nevertheless, would advance the goals of the Mine Act, improving workplace safety and health, while at the same time reducing unnecessary burdens of compliance. Uncertain regulatory enforcement creates confusion and instability for operators and workers, leading to higher costs of production and reduced safety.

Finally, it is noteworthy that the essential thrust of Lancashire's argument is to urge that no governmental oversight was appropriate for the demolition activity involved in this case. MSHA had exercised jurisdiction over this site while it was a working operation. OSHA never had visited the site and, so far as the record discloses, was unaware of the operation and the demolition. Lancashire does not seek review of the judge's rulings upholding validity of the citations and orders, but seeks review of the judge's decision that the cited working conditions were subject to Mine Act jurisdiction. The judge's decision is reasonable and adequately supported; the argument against that ruling does not comport with the fundamental concern of the operator for safety first, as required by the Congress in Section 2 of the Mine Act.

III.

Conclusion

For the foregoing reasons, we would affirm the judge's decision.

Acting Chairman Backley and Commissioner Doyle, dissenting:

Lancashire Coal Company ("Lancashire") ceased operations at its No. 25 Mine in 1983. The shafts were sealed in 1986, and, in 1988, MSHA classified the work site as permanently abandoned. Subsequently, as part of its reclamation effort, Lancashire contracted with K&L Equipment Co., Inc. ("K&L") to demolish the old coal silo and screen house on the property. On March 20, 1989, during the demolition, one of K&L's employees was killed.

The following day, an inspector from the Mine Safety and Health Administration ("MSHA") inspected the site (under protest from Lancashire and K&L), and issued several citations to K&L. He also issued to Lancashire two control orders and a citation, pursuant to 30 C.F.R. 77.200, 1 alleging that Lancashire had failed to maintain the coal silo and screen house in good repair. The inspector then consulted with his Subdistrict Manager, and subsequently the District Manager sought clarification from the MSHA Administrator "as to MSHA's jurisdiction and the operator's responsibility to comply with the Act and Title 30 [C.F.R.] and the jurisdiction over contractor activities at the mine site." Exh. R.36 at 1. The Associate Solicitor, in a memorandum dated May 2, 1989, advised that K&L's activities were "mining activities within the meaning of the 1977 Act." Exh. R.37 at 3. In the meantime, the inspector had returned to the mine and issued two additional citations, one pursuant to 30 C.F.R. 45.4(b), 2 alleging that Lancashire had failed to keep required recorda with respect to K&L in its office (name, address, telephone number, nature

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1/ Section 77.200 provides as follows:

> Surface installations; general.
>
> All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

30 C.F.R. 77.200.

2/ Section 45.4(b) provides as follows:

> 45.4 Independent contractor register.
>
> (b) Each production.operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall

make this information available to any authorized representative of the Secretary upon request.

30 C.F.R. 45.4(b).

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of work to be done, etc.) and the second pursuant to 30 C.F.R. 77.1712, alleging that Lancashire had failed to notify MSHA "prio to reopening."

Lancashire challenged the citations and orders on the grounds that MSHA did not have jurisdiction over the mine site. The administrative law judge concluded, based on his reading of the legislative history and on the Commission's decision in Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), 4/ that Lancashire's property was a "mine" as defined in the Mine Act and that, therefore, MSHA had jurisdiction at the time of the inspections. 12 FMSHRC at 291, 295, 303. He upheld the violation of 30 C.F.R. 77.200, finding that Lancashire had failed to maintain the mine in good repair, as required by that regulation. He also sustained the recordkeeping violation charged under 30 C.F.R. 45.4(b). The judge vacated the citation with respect to section 77.1712, based on his conclusion that, in order to establish a violation of that section, "there must be some indicia of active coal mining operations, or at least some evidence that a mine operator intended to resume the active mining of coal." 12 FMSHRC at 303. The Secretary of Labor ("Secretary") did not petition for review of that determination.

Our two colleagues would affirm the judge's decision that Lancashire's demolition project is subject to Mine Act jurisdiction. In doing so, they state that they rely on the language of the statute, as "further clarified by its legislative history and by the Commission's decisions (slip op. at 6) but they refuse to apply the Commissions's earlier framework for determining Mine Act coverage as set forth in Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). Slip op at 12-14. They refused to consider the so-called Huntsville Gob Memorandum, which is part of the record, because it

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4/ Section 77.1712 provides as follows:

> Reopening mines; notification; inspection prior to mining.
>
> Prior to reopening any surface coal mine after it has been abandoned or declared inactive by the operator, the operator shall notify the Coal Mine Health and Safety District Manager for the district in which the mine is located, and an inspection of the entire mine shall be completed by an authorized representative of the Secretary before any mining operations in such mine are instituted.

30 C.F.R. 1712.

Following the Commission's decision in Westwood, the Secretary filed

a Motion to Approve Settlement with the Commission, whereby MSHA agreed not to "assert jurisdiction over Westwood in the future, as long as Westwood does not materially change the manner in which it [operates]." Sec.'s Motion to Dismiss in Westwood at 2.

"... does not purport to be a statement of MSHA policy... ." Slip op. at 14. 5/ They further find that Lancashire's operations are exempt from coverage under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (1988)("OSHAct") pursuant to section 4(b)(1) thereof. 29 U.S.C 653(b)(1). Slip op. at 15-16. We disagree that Lancashire's demolitio project is subject to regulation under the Mine Act rather than under the OSHAct.

In reviewing the Mine Act and its legislative history in an attempt to glean precisely what Congress intended to regulate, our colleagues focus exclusively on the definition of "coal or other mine" set forth in section 3(h)(1) and the definition of "coal mine" set forth in section 3(h)(2) and the legislative history of those sections. That legislative history, which has been widely quoted in advocating Mine Act coverage, indicates that the definition of a mine is to be "given the broadest possible[e] interpretation" and that "doubts [should] be resolved in favor of inclusion...." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977) reprinted in Legis. Hist. at 602. While that language is expansive, it is not without bounds and one must also consider that the Mine Act was intended to establish a "single mine safety and health law, applicable to all mining activity." (emphasis supplied) S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977) reprinted in Legis. Hist. at 1315. 6/ More importantly, section 2(g) of the Mine Act makes clear that "it is the purpose of [the Mine Act] ... to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. 801(g) (emphasis supplied.) Nowhere in the Mine Act or in its legislative history is there any indication that Congress intended the Mine Act, no matter how broadly it is to be interpreted, to govern the building demolition industry or its employees, any more than there is indication that Congress intended the Mine Act to govern other industries engaged in reclamation or in post-reclamation use of abandoned mines, as our colleague's decision would dictate. 7/

We also view our colleagues's decision to be inconsistent with the

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5/ In the Huntsville Gob Memorandum, dated May 24, 1989, the same Associate Solicitor who had supported Mine Act jurisdiction in this case opined that "[o]ther activities more remote from mining, such as reclamation work occurring on previously mined abandoned lands are not subject to the Mine Act." Huntsville Gob Memorandum at 1.

6/ As noted by the D.C. Circuit, statutes "are not to be read over-literally" and must be interpreted in light of the spirit in which they were written and the reasons for their enactment." General Serv. Emo. U. Local No. 73 v. N.L.R.B., 578 F.2d 361, 366 (D.C. Cir. 1978).

7/ It should be noted that there were no Lancashire miners on the property

who could have been endangered or otherwise affected by K&L's activities.

Commission's holding in Elam, 4 FMSHRC 5. 8/ In this case the judge accepted joint stipulations which confirmed that, after September 6, 1988, Lancashire took no action to indicate that it intended to resume the extraction, production, milling or processing of coal. Stip. 13, Exh. ALJ-1. September 6, 1988, was of course, the day MSHA officially declared the subject work site permanently abandoned. Indeed, after reviewing all the evidence, and in support of his decision to vacate the citation of 30 C.F.R. 77.1712, the judge concluded:

> On the basis of the facts and evidence adduced in these proceedings, I cannot conclude that the demolition and removal of the structures in question from the abandoned mine site in question were closely associated with activities normally associated with active coal mining. It is undisputed that active coal mining had not taken place at the site for at least 6-years prior to the demolition activities in question, and the underground shafts were permanently sealed in 1986, and MSHA declared the mine permanently abandoned in 1988. Mr. Falger's unrebutted credible testimony suggests that the structures which were being demolished and removed from the site had not been used in any mining activity for at least 18 years prior to their demolition. There is no evidence that Lancashire ever intended to resume any active coal mining activities at the time the demolition work was taking place. The site was dormant, and there is no evidence that Lancashire had taken any action to resume the extraction or processing of any coal after the site was declared permanently abandoned. Further, the demolition work was being done by K&L, and there is no evidence that any Lancashire employees were performing any of this work.

12 FMSHRC at 302 (emphasis supplied.)

The foregoing determination of the judge provides compelling support of Lancashire's argument that the principle enunciated by this Commission in Elam, 4 FMSHRC 5, dictates a conclusion that, under the facts of this case, MSHA did not have jurisdiction over Lancashire's work site.

In Elam, the Commission eschewed a mechanical, reflexive determination

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8/ While we do not disagree that the "'work of preparing the coal' is not an issue" in this case (slip op. at 13) or that "Elam applies when an operation is performing some functions normally associated with coal

preparation" (slip op. at 13), we disagree that its application is so limited.

of jurisdiction under the Mine Act. Notwithstanding the fact that Elam actually performed many of the functions expressly included in the Mine Act's definition of coal preparation. i.e., storing, breaking, crushing, and loading, the Commission concluded that Elam was not "mining" but, rather, was performing those functions incidentally to its business, which was the commercial loading of coal and other material at a dock. Significantly, the Commission held:

> ... inherent 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 work activities, but also into the nature of the operation performing such activities.

Elam, 4 FMSHRC at 7.

In deciding thusly, the Commission reconciled a broad jurisdictional mandate in a way that was not obscured by the existence of superficial conditions which could have been seized upon to support a contrary conclusion. We seek to do no less in resolving the instant case.

Clearly the record in this matter establishes that Lancashire's operation, at the time MSHA asserted jurisdiction, was exclusively demolition. In our colleagues view, Lancashire's acknowledgement that Pennsylvania state law mandates the demolition of above ground structures of permanently abandoned facilities is a concession that such demolition is part of "the normal mining process." Slip op. at 14. Thus, they conclude that, even under Elam, Lancashire is subject to the Mine Act. Id. We do not agree. There are many activities incidental to the establishment and winding down of a mining business that are not regulated by the Mine Act. Certainly, the acts of leasing coal reserves, obtaining permits, securing financing and insurance, purchasing mining equipment, obtaining electrical power, and marketing the coal produced are all activities "related to the overall process of mining coal" but are all clearly not subject to Mine Act jurisdiction. Moreover, in construing the breadth of the jurisdiction of this federal statute, it is clearly error to rely upon the existence of a particular state law. Obviously our holding today applies nationally, irrespective of the provisions of a particular state's reclamation requirements.

Proper application of the Elam test compels a determination that, under the facts of this case, MSHA erroneously asserted jurisdiction over the demolition activities at the Lancashire work site.

The affirming Commissioners also conclude that Lancashire is exempt

from OSHAct coverage because "the Secretary exercised her inspection authority under the Mine Act" and the "Secretary has never attempted to regulate the safety and health conditions at Lancashire under the OSHAct." Slip op. at 15. Evidently they are of the opinion that, anytime MSHA conducts an after-the-fact inspection of an accident site, the operator of that site becomes subject to a retroactive application of Mine Act

jurisdiction and regulations and is automatically exempted from the OSHAct pursuant to the provisions set forth in section 4(b)(1) thereof.

The Secretary generally regulates safety and health under the OSHAct, but regulation thereunder does not extend to "working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1). The court in Southern Ry. Co. v. OSHRC, 539 F.2d 335 (4th Cir. 1976), cert. denied. 429 U.S. 999 (1976), relied on by the affirming Commissioners (slip op. at 14), emphasizes that the legislative history of the OSHAct clearly indicates that it is not the mere existence of the authority of another agency to act, but its adoption and enforcement of rules and regulations that exempts employees from coverage under the OSHAct. 539 F.2d at 336, 337. In that case. Southern argued that all its employees were exempt from OSHAct coverage because the Federal Railway Administration ("FRA") had promulgated regulations affecting the working conditions of railway employees. The Secretary of Labor contended that, although FRA had authority to regulate all areas of employee safety for the railway industry, section 4(b)(1) of the OSHAct exempts only those areas of railway employee safety in which FRA had actually exercised its authority. Finding that the safety regulations of FRA were confined almost exclusively to over-the-road transportation operations, and that FRA had not issued regulations with respect to offices, shops and repair facilities, the court rejected both the broad "industry wide" exemption urged by Southern, as well as the narrow "particular discrete hazards" exemption urged by the Secretary. 539 F.2d at 338, 339. Rather, it found that the exemption from OSHAct coverage applies where another agency "has exercised its statutory authority to prescribe standards" for the "environmental area in which an employee customarily goes about his daily tasks." 539 F.2d at 339 (emphasis added). Accordingly, the court found no exemption from the OSHAct for those areas of Southern's operation with respect to which FRA had not issued regulations. 539 F.2d at 339-40. 9/

Notwithstanding our colleagues' unsupported assertion to the contrary (slip op. at 16), MSHA has not exercised regulatory authority. It has not addressed either the "environmental area" or the "precise hazards" involved with this demolition project as evidenced by the fact that MSHA could cite

Lancashire only for (1) its failure to maintain the mine in good condition, when it was actually demolishing the structure in issue, (2) for its failure to notify MSHA that it was reopening a mine, when it was actually taking further steps to preclude ever reopening (a citation that was vacated by the

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9/ It is informative to note that the Secretary has maintained the position asserted in Southern Rv. as recently as December, 1990, in a brief filed in the pending case of Pennsylvania Electric Company v. FMSHRC, No. 90-3636, (3d Cir.). In that brief, she states that she "continues to maintain that OSHA is preempted under section 4(b)(1) only if another agency has addressed the precise hazard at issue." Sec. Br. in Pennsylvania Electric Company at 40, n. 32. (emphasis supplied).

judge), and for (3) a recordkeeping violation. OSHA, on the other hand, has issued specific regulations with respect to demolition, 29 C.F.R. 1926.850 et seq. (1988). Included is a regulation requiring that an engineering survey be conducted prior to the commencement of demolition to determine, among other things, the possibility of unplanned collapse. 29 C.F.R. 1926.850(a). 10/

The Fifth Circuit has also addressed this issue in Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976). Relying on the legislative history of the OSHAct, the court found that the "Senate proceedings clearly demonstrate that the Senate language [which was substituted for the House version] was not intended to create an industry-wide exemption." 539 F.2d at 390.91. The court further found that "interpretation of section 4(b)(1) as an industry-wide exemption becomes ... an assertion inconsistent with an announced statutory purpose," i.e., "to assure so far as possible to every man and woman in the nation, safe and healthful working conditions." 539 F.2d at 391, 29 U.S.C. 651(b).

The Third Circuit has also concluded that "section 4(b)(1) preemption requires a two-part showing; first, that a coordinate federal agency has 'exercised' authority by promulgating regulations in the area and second, that these concurrent regulations cover the specific 'working conditions'...." Columbia Gas of Pa., Inc. v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980). "The preempting agency must actually promulgate regulations, mere declaration of authority is not enough." 636 F.2d at 916, n. 7.

It appears that the affirming Commissioners have equated MSHA's post accident inspection and shoe-horn attempts at citations with "regulation," and have ignored OSHA's final regulations in concluding that no attempts have been made by OSHA to regulate this demolition project. However, the Secretary herself recognizes, albeit in other cases, that "regulation" sufficient to exempt an operator from OSHAct coverage does, in fact, require the promulgation of regulations.

In rejecting the third, fourth and fifth circuits' holdings in Southern Rv. Co., Columbia Gas of Pa., and Southern Pacific Transportation

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10/ Section 1926.850(a) of the OSHA regulations provides, in relevant part, as follows:

> Preparatory operations.
>
> (a) Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and

> walls, and possibility of unplanned collapse of any
> portion of the structure....

29 C.F.R.   1926.850(a).

Co., our colleagues state that, under such a rationale (requiring the issuance of demolition regulations to establish MSHA jurisdiction), "consequences would ensue that are at variance with Congressional intent." Slip op. at 15. Obviously they are ignoring Congress' intent in enacting the OSHAct, and in particular section 4(b)(1) thereof, i.e., to remove jurisdiction from OSHA only when another agency with authority to regulate safety in the workplace has actually taken steps in that direction by issuing regulations.

In attempting to distinguish this case, our colleagues state that we are dealing here with "the Secretary's direct assertion of statutory authority for MSHA" as opposed to her defense of jurisdiction "where OSHA has asserted authority and where that authority is being challenged." Slip op. at 16. While we do not disagree with that statement, we do not see that it provides a basis for a different interpretation of the same law. Nor do our colleagues enlighten us as to why this should be the case. They also assert, without support, that "[t]his is not a case where OSHA's residual regulatory authority derives from a lack of exercise of regulatory authority by another agency." Slip op. at 16. In fact, this is just such a case if one recognizes, as have the courts as well the Secretary, that "regulation" does, in fact, require the issuance of regulations. In this case, no MSHA regulations exist. 11/

Our colleagues also seem to be of the opinion that MSHA is not a separate agency from OSHA because they are "within a single cabinet-level department, under a single Secretary." Slip op. at 16. Whether the pre-empting agency is within or without "a single cabinet level department under a single Secretary" is totally irrelevant to the purpose of section 4(b)(1) of the OSHAct, i.e., that protection of the OSHAct is not to be pre-empted unless another agency has specifically regulated at least the "environmental area" in question. 12/

11/ In our view, our colleagues misread the Commission's decision in Kings Knob Coal Company, Inc., 3 FMSHRC 1417 (June 1981). That case does not deal with "inconsistent enforcement policies of the Secretary" (slip op. at 14-15) nor did the Commission "conclude[] that inconsistent enforcement policies of the Secretary are not necessarily dispositive of whether a violation occurred." Id. at 15. The issue in that case was whether the Secretary was estopped from enforcing a regulation as written because MSHA's Manual set forth a different interpretation of what the regulation required. 3 FMSHRC at 1417. The Commission rejected King Knob's argument on the grounds that "equitable estoppel generally does not apply against the government." 3 FMSHRC at 1421.

12/ Even the Secretary has not advocated this approach, either in this case or in Pennsylvania Electric Company, where she argues that her

promulgation of an MSHA a standard applicable to the working conditions in issue triggers pre-emption of OSHAct jurisdiction. Sec. Br. in Pennsylvania Electric Company at 37.

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Finally, our colleagues assert that "the essential thrust of Lancashire's argument is to urge that no governmental oversight was appropriate for the demolition activity involved in this case." Slip op. at 17. A careful reading of Lancashire's Brief and its Supplemental Brief prove otherwise. In its initial Brief, Lancashire states:

> ... While MSHA's expertise in the extraction, milling and preparation of minerals may be of use when dealing with an underground tunnel or even possibly the construction of a structure that is to be used in the mining process, it would be of little use in connection with the demolition of above ground structures at an abandoned mine site. The proper demolition of a storage silo does not depend on whether it used to be filled with coal or grain. Thus, it makes perfect sense for the more general agency, OSHA, and not MSHA, to have jurisdiction over the demolition of such structures.

Lanc. Brief at 12, n.10.

In its Supplemental Brief, Lancashire states:

> ... Thus, enforcement of health and safety standards in connection with such demolition can and should be carried out by the more generalized Occupational Safety and Health Administration ("OSHA"), and not by MSHA. Furthermore, as explained in Petitioner's Brief at 12 n.10, exclusion from Mine Act coverage for the demolition of these structures is entirely consistent with the OSHA-MSHA interagency agreement.

Lanc. Supplemental Brief at 5. The thrust of Lancashire argument is that OSHA should regulate reclamation-oriented activities such as demolition at abandoned mine sites.

In this case, there is no evidence that the safety of any miners (the group Congress intended to protect when it enacted the Mine Act) was involved. The Secretary has issued no regulations under the Mine Act that enhance safety in the circumstances at issue, which is, after all, the goal of both the Mine Act and the OSHAct. Had the engineering survey required under the OSHAct been done, perhaps Lancashire and K&L would have been alerted to the fact that the procedure being contemplated was unsafe. (MSHA's regulations do not tell us what it would have required had Lancashire advised MSHA that it was "reopening" the building it was planning to

demolish.) The Secretary's position here is not only inconsistent with her position in other projects (as evidenced by the Huntsville Gob Memorandum) and other cases (as evidenced by her argument in Southern Rv. and her brief in Pennsylvania Electric), but the record is devoid of evidence indicating any previous attempts to enforce the Mine Act in this

fashion. 13/ In addition, the inspector, who was uncertain of whether MSHA had jurisdiction, was apparently unable to get clarification from either his Subdistrict or District Managers, as evidenced by the memo from the District Manager to the MSHA Administrator requesting a determination.

In summary, we are of the opinion that Congress did not intend to regulate the demolition industry under the Mine Act, that neither this "hazard" nor "environmental area" is addressed in Mine Act regulations so as to trigger the section 4(b)(1) preemption from the OSHAct, and that the Secretary's assertion of jurisdiction under the Mine Act, even if entitled to weight, is unreasonable in this case. Accordingly, we would reverse the administrative law judge and vacate the citations and orders.

13/ In fact, the evidence of record is to the contrary. MSHA Inspector Sparvieri testified that once a mine site has been permanently abandoned, MSHA's duty to inspect it ceases. Tr. 94. MSHA inspector Leroy Nienenre testified that, although he had conducted at least one inspection at the Lancashire site during the time of the demolition project, he had been told by the supervisor not to inspect it. Tr. 234-37. He was not aware of any time that MSHA had asserted jurisdiction at an abandoned mine because of demolition work taking place. Tr. 237. The affidavit of retired MSHA inspector Thomas J. Summers, received into evidence as Exhibit C.3, states that in his eighteen years experience with MSHA he was unaware of any cases in which a permanently abandoned mine was again inspected by MSHA except where steps were taken by the operator that indicated the resumption of production or processing of coal. Exh. C.3 at 3.