CCASE:
AIR PRODUCTS AND CHEMICALS V. SOL (MSHA)
DDATE:
19931209
TTEXT:

December 9, 1993

AIR PRODUCTS AND CHEMICALS, INC.	:	
	:	
v.	:	Docket No. PENN 91-1488-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

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

DECISION

BY: Backley and Nelson, Commissioners(Footnote 1)

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"). It involves a citation alleging a violation of section 103(a) of the Mine Act issued to Air Products and Chemicals, Inc. ("Air Products") after it denied an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") entry to its Cambria Co-Generation Facility ("Cambria").(Footnote 2) Administrative Law Judge Gary Melick vacated the citation. 13 FMSHRC 1657 (October 1991)(ALJ). He concluded that, although MSHA had statutory jurisdiction over coal handling portions of the Cambria operation, MSHA had failed to displace the enforcement authority of the Department of Labor's Occupational Safety and Health Administration ("OSHA"). 13 FMSHRC at 1661-63. The Commission granted cross-petitions for discretionary review of the judge's decision filed by the Secretary of Labor and Air Products. For the reasons discussed below, we affirm the judge's decision in part and reverse in part.

---

1 Commissioners Backley and Nelson join in this opinion to reverse the judge's determination that Air Products and Chemicals, Inc. did not violate section 103(a) of the Mine Act, 30 U.S.C. 813(a). Commissioner Doyle, writing separately, concurs in result with Commissioners Backley and Nelson. Chairman Holen, dissenting, would vacate the citation alleging a violation of section 103(a) and affirm in result the judge's decision.

---

2 Section 103(a) of the Act provides in pertinent part that "any authorized representative of the Secretary ... shall have a right of entry to, upon, or through any coal or other mine." 30 U.S.C. 813(a).

I.

Factual and Procedural Background

Cambria uses bituminous coal refuse and "run-of-mine" coal to produce electricity and steam.(Footnote 3) 13 FMSHRC at 1658. The coal refuse, provided by RNS Services, Inc. ("RNS"), is delivered by truck to Cambria.(Footnote 4) The refuse is deposited into a hopper, where it passes through a grizzly, which separates and removes over-sized material. Id. The refuse is transferred, stored, and then conveyed to a Bradford breaker, which breaks and screens the material in a rotating drum. Id. The material is further screened, sized, crushed, and stored until it is fed into combustion boilers. Id. The run-of-mine coal is delivered by truck to a hopper, then transferred, and stored. Id. That material also is screened, sized, crushed, and stored until it is burned. 13 FMSHRC at 1658-59.

On August 2, 1989, during the initial stages of Cambria's construction, MSHA Subdistrict Manager Tim Thompson met with Air Products officials to determine whether the facility was subject to Mine Act jurisdiction. 13 FMSHRC at 1659. Air Products indicated that the refuse supplier would perform coal processing at its mine before the refuse was transported to Cambria, and that Air Products would only customize the refuse by sizing and crushing it to the particular specifications required by its boiler. Id. Thompson advised Air Products that Cambria would not fall within MSHA's jurisdiction. Id.

Air Products completed construction of the facility and trained its employees in accordance with OSHA specifications and regulations. 13 FMSHRC at 1659-60. In August 1990, OSHA conducted a routine inspection of the entire plant and issued citations. 13 FMSHRC at 1660.

In September 1990, MSHA discovered that RNS would not be performing onsite processing but that processing would take place only at Cambria. 13 FMSHRC at 1659. Subdistrict Manager Thompson telephoned Terry Lane, a regional administrator for OSHA, explaining his belief that MSHA had jurisdiction over the Cambria coal handling facilities and inviting Lane to attend a meeting on October 31 to discuss Mine Act jurisdiction. 13 FMSHRC at 1659; Tr. 125. Thompson testified that Lane stated that he would not attend, but that someone from OSHA's Pittsburgh office might attend. 13 FMSHRC at 1659; Tr. 125. No OSHA representatives were present at the meeting, and MSHA did not further contact OSHA. 13 FMSHRC at 1659.

During the October meeting, Thompson and Air Products officials discussed the fact that RNS was not screening or sizing the coal before delivering it to Cambria and that Air Products had acquired and was using a Bradford breaker. Tr. 84-85, 104-05, 148-49. Thompson advised Air Products

---

3 Refuse is material rejected in initial coal processing. Tr. 62, 102. "Run-of-mine" coal is coal that has not been processed. Tr. 74.

---

4 MSHA asserts jurisdiction over RNS and its independent contractors. Tr. 64-65, 73-74.

that Cambria's coal handling facilities were subject to Mine Act jurisdiction. 13 FMSHRC at 1659. MSHA officials subsequently examined the coal handling facilities at Cambria, and again met with Air Products, confirming MSHA's asserted jurisdiction. Tr. 85-86.

In April 1991, the Associate Solicitor of Labor concluded in a written opinion that certain of Cambria's coal handling facilities fell within Mine Act coverage. S. Exh. 4; Tr. 90. On May 24, 1991, during a compliance assistance visit at the Cambria plant, MSHA Inspector Gerry Boring discussed the Solicitor's opinion with an Air Products official. Tr. 92. On September 5, 1991, upon returning to the facility to conduct a routine inspection, Inspector Boring was denied entry and, accordingly, issued a citation alleging a violation of section 103(a) of the Mine Act. Tr. 46-47. The citation was terminated after the plant manager allowed him entry.(Footnote 5) S. Exh. 1; Tr. 47. Air Products subsequently contested the citation, and an expedited hearing was held before Judge Melick.

The judge found that some areas in the Cambria plant were subject to Mine Act jurisdiction since they contained "structures," "equipment," and "machinery" used in the "work of preparing the coal", as that phrase is defined in section 3(i) of the Mine Act, 30 U.S.C. 802(i). 13 FMSHRC at 1661. The judge vacated the citation, however, because he determined that MSHA's inspection of the Cambria facility did not reflect "a reasoned resolution of the jurisdictional question by the Secretary and her agencies" but, rather, "resulted from an ad hoc unilateral assertion of jurisdiction by MSHA." 13 FMSHRC at 1663 (citations omitted).

II.

Disposition of Issues

A. Mine Act Jurisdiction

Air Products argues that the judge erred in finding the Cambria facility a "mine" subject to the Mine Act, because although it engages in some of the activities listed in section 3(i) of the Act as the "work of preparing the coal," its preparation activities are not those usually performed by a coal mine operator. A.P. Br. at 5, 12. Air Products states that it does not prepare coal for resale but, rather, as the ultimate consumer, handles coal merely to consume it generating electricity. A.P. Br. at 9.

Section 4 of the Mine Act, 30 U.S.C. 803, provides that each "coal or other mine" affecting commerce is subject to the Mine Act. Section 3(h)(1) of the Mine Act, 30 U.S.C. 802(h)(1), broadly defines "coal or other mine" as including "facilities, equipment [and] machines ... used in ... the work of preparing coal...." The term "work of preparing the coal," as defined in section 3(i) of the Act includes "breaking, crushing, sizing [and] storage" of coal, and "such other work of preparing ... coal as is usually done by the

---

5 Boring issued additional citations, contests of which have been stayed pending disposition of this case. Tr. 48; A.P. Post-Arg. Br. at 5 n.1.

operator of [a] coal mine."

In Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), the Commission concluded that a culm bank operation, in which culm (anthracite coal mining waste) was screened and crushed to the specifications required by Westwood's electric generation facility, was subject to Mine Act jurisdiction. 11 FMSHRC at 2412-15. The Commission explained that Westwood, which performed some of the processes enumerated in section 3(i) of the Mine Act, engaged in the work of preparing coal that is usually done by a coal mine operator. 11 FMSHRC at 2414-15. The Commission rejected Westwood's "ultimate consumer" argument that its facility was not subject to Mine Act jurisdiction because Westwood did not prepare coal for resale but, rather, for its own consumption. Id.

The Commission applied similar reasoning in Pennsylvania Electric Co., 11 FMSHRC 1875, 1879-82 (October 1989) ("Penelec"), concluding that conveyor head drives used to transport coal at an electric generation facility were subject to Mine Act jurisdiction. The United States Court of Appeals for the Third Circuit affirmed this determination, stating that "the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation `usually done by the operator of a coal mine.'" Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501, 1503 (3d Cir. 1992).

Here, it is undisputed that Air Products engages at Cambria in some of the coal preparation activities enumerated in section 3(i) of the Mine Act, namely, breaking, crushing, sizing, and storing coal. A.P. Br. at 12; S. Br. at 10. In addition, both parties acknowledge that such activities are essentially similar in nature to those conducted at the Westwood facility. A.P. Br. at 21 & n.9, 32 n.16; S. Reply Br. at 8-9.(Footnote 6) Consistent with Westwood, we conclude that Air Products, which performs some of the coal preparation activities listed in section 3(i) of the Mine Act, engages in the work of preparing coal that is usually done by a coal mine operator.(Footnote 7) This holding is also consistent with the Third Circuit's Pennsylvania Electric decision, in that the Cambria coal handling structures, equipment, and machinery, like Penelec's conveyor head drives, perform functions necessary in the "work of preparing the coal" before the coal is transferred to the boiler building to produce energy. We therefore affirm the judge's finding that Cambria's coal handling facilities are subject to Mine Act jurisdiction.

---

6 Air Products does not dispute the judge's statement that:

> Air Products acknowledges that the nature of the facility herein is essentially indistinguishable from the nature of the facility found by the Commission in Westwood ... to be within Mine Act jurisdiction.

13 FMSHRC at 1661.

---

7 For the same reasons set forth in Westwood and Penelec, we reject Air Products's ultimate consumer defense. See Westwood, 11 FMSHRC at 2415; Penelec, 11 FMSHRC at 1881.

B. Preemption

With respect to whether MSHA properly exercised its statutory enforcement authority sufficient to preempt OSHA's enforcement authority at Cambria, we note that the Secretary, through MSHA, has promulgated regulations in 30 C.F.R. Part 77 (surface coal mines). Inspector Boring issued citations alleging violations of Part 77 as covering the working conditions at Cambria's coal handling facilities.(Footnote 8) A.P. Post-Arg. Br. at 6-7; see Pennsylvania Electric, 969 F.2d at 1504, applying Columbia Gas v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980). Although these citations are not presently before us (n.5, supra), there is nothing in the record to persuade us that the cited surface coal regulations in Part 77 may not colorably be applied to Cambria's coal handling facilities. In addition, it is noteworthy that before Inspector Boring issued the citations alleging violations of Part 77 and the access citation, Air Products had been provided adequate notice, through meetings with MSHA and a compliance assistance visit, that MSHA would be asserting Mine Act jurisdiction over those areas of Cambria listed in the Solicitor's opinion as subject to Mine Act jurisdiction. See Westwood, 11 FMSHRC at 2416; Penelec, 11 FMSHRC at 1883. In these circumstances, we reverse the judge's conclusion that MSHA had not properly asserted its jurisdiction.

C. Violation

As to the issue of violation before us, the relevant factual record and applicable legal principles are sufficiently clear for resolution on review without the necessity of a remand. The evidence is undisputed that Air Products denied Inspector Boring entry based upon its belief that the Cambria facility was not subject to the Mine Act. Tr. 46. Section 103(a) of the Act (n.2 supra) grants authorized representatives of the Secretary a right of entry into all mines for the purpose of performing inspections. See, e.g., Calvin Black Enterprises, 7 FMSHRC 1151, 1156 (August 1985); United States Steel Corp., 6 FMSHRC 1423, 1430-31 (June 1984); see generally Donovan v. Dewey, 452 U.S. 594, 598-606 (1981). Given our conclusions above, Air Products violated section 103(a) by denying Inspector Boring entry. Accordingly, we reverse the judge's determination that Air Products did not violate section 103(a), and we affirm the citation.

---

8 Under section 4(b)(1) of the Occupational Safety and Health Act (the "OSHAct"), 29 U.S.C. 653(b)(1), OSHA standards apply to working conditions unless another federal agency exercises its statutory authority in a manner preempting OSHA coverage. See Penelec, 11 FMSHRC at 1878-79. In Pennsylvania Electric, the Third Circuit stated that OSHA preemption analysis requires the application of a two-part test:

> (1) [whether] a regulation was promulgated by a ... federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue.

969 F.2d at 1504, citing Columbia Gas v. Marshall, 636 F.2d 913, 915-16 (3d Cir. 1980).

Finally, we find it appropriate to reiterate our concern, expressed in detail in Penelec, 11 FMSHRC at 1885, and Westwood, 11 FMSHRC at 2418-19, that the Secretary continues to avoid resolving disputes with operators regarding dual regulation by OSHA and MSHA at electric generation facilities without implementation of the procedures set forth in the Department of Labor's MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (April 17, 1989), amended 48 Fed. Reg. 7521 (February 22, 1983)("Interagency Agreement"). Conflicting indications of enforcement authority by the Secretary, through MSHA and OSHA, may create confusion, compromise safety, and result in higher costs of production as operators readapt their facilities to comply with competing regulations. Such confusion may increase upon promulgation of final safety standards by OSHA applicable to the operation and maintenance of electric power generation facilities.(Footnote 9) Implementation of the Interagency Agreement procedures would resolve such jurisdictional confusion in an expeditious and effective manner, and we strongly urge the Secretary to follow such a course of action.

---

9 OSHA has published proposed safety standards relating to electric power generation facilities. 54 Fed. Reg. 4974-5024 (January 31, 1989). The proposed standards have not yet been published as final rules.

III.

Conclusion

For the reasons discussed above, we affirm the judge's determination as to jurisdiction, but reverse his determination that Air Products did not violate section 103(a) of the Mine Act. Accordingly, the citation is affirmed.

Richard V. Backley, Commissioner

L. Clair Nelson, Commissioner

Commissioner Doyle, concurring:

I am constrained to concur in the determination that the operations of Air Products and Chemicals, Inc. ("Air Products") fall within the jurisdiction of the Mine Safety and Health Administration ("MSHA") and to reverse the judge's decision, which vacated the citation because there was no evidence of a reasoned resolution of the jurisdictional question between MSHA and the Occupational Safety and Health Administration ("OSHA").

In Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501 (3d Cir. 1992), the Court concluded that each of the activities listed in section 3(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. 802(i) (1988), as part of the "work of preparing the coal," wherever and by whomever performed and irrespective of the nature of the operation, subjects anyone performing that activity to the jurisdiction of the Mine Act, if MSHA has promulgated a regulation governing the working conditions at issue. 969 F.2d at 1503.(Footnote 1)

It would appear that, under the Third Circuit's decision, the activities initially contemplated by Air Products (sizing and crushing coal) would also have subjected it to Mine Act jurisdiction, although, as found by the administrative law judge, MSHA advised Air Products that those activities would not bring it under the Mine Act. 13 FMSHRC 1657, 1659 (October 1991).(Footnote 2)

---

1 But cf. Stroh v. Director, OWCP, 810 F.2d 61 (3d Cir. 1987), which noted that delivery both to the ultimate consumer of a finished product and to one purchasing and processing raw coal for its own consumption would fall outside Mine Act coverage. 810 F.2d at 64. In Pennsylvania Electric, the Court chose not to treat Pennsylvania Electric Company ("Penelec") as one purchasing and processing coal for its own consumption. Rather, it treated the processing facility, located "within [Penelec's] electric generating plant" (969 F.2d at 1502), as a separate entity from Penelec's "energy producing facility." Id. at 1504 (emphasis added).

---

2 If MSHA has jurisdiction, it does not have the discretion to waive it as to some entities, as it did in settling the factually similar Westwood Energy Properties, 11 FMSHRC 2408 (December 1989). MSHA agreed not to exercise jurisdiction over Westwood while simultaneously claiming that the settlement agreement "[did] not constitute a change in policy by the Secretary regarding jurisdiction over other similar operations." Secretary's Motion to Approve Settlement and to Dismiss in Westwood at 2. The Secretary, in attempting to reconcile his inconsistent actions, relies on cases such as Heckler v. Chaney, 470 U.S. 821 (1985), which deal with an agency's decision not to exercise enforcement authority committed to its discretion. Sec. Br. at 10-15. Those cases involve not only a different legal issue (prosecutorial discretion vs. waiver of jurisdiction) but a different factual situation as well. Under the Mine Act, enforcement is not left to MSHA's discretion. Section 103(a) requires the agency to inspect all surface mines in their entirety at least twice each year. 30 U.S.C. 813(a)(1988).

~2436

In any event, given the breadth of the Third Circuit's holding, the judge must be reversed and the citation affirmed.

____

Joyce A. Doyle, Commissioner

Chairman Holen, dissenting:

I respectfully dissent. Applying Judge Mansmann's analysis in her dissent in Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501, 1506-17 (3d Cir. 1992), I would vacate the citation against Air Products and affirm the judge's decision in result.

As Judge Mansmann observed, the operator of an electrical generating facility is not an operator of a coal mine, as that term is commonly understood. 969 F.2d at 1509. Further, if a coal consumer becomes a coal preparation facility within the meaning of section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802(h)(1)(1988)("Mine Act"), by engaging in any of the activities listed in section 3(i), 30 U.S.C. 802(i), the Mine Act potentially reaches every end user of coal. 969 F.2d at 1509-10. Such a broad interpretation is ultimately at odds with the legislative history of the Mine Act, which is directed to safety and health problems associated with mining activity. Id. at 1510. Judge Mansmann also reasoned that the Third Circuit's decisions applying section 3(h)(1) of the Mine Act to the Black Lung Benefits Act, 30 U.S.C. 901 et seq. (1988), do not support coverage of ultimate consumers of coal, including those who prepare coal for their own use. Id. at 1510-12 & n.8. Finally, she could find no basis for the preemption of jurisdiction of the Occupational Safety and Health Administration ("OSHA") by the Mine Safety and Health Administration ("MSHA"), in light of inconsistent and equivocal exercise of regulatory authority by MSHA. Id. at 1513-17. Accordingly, Judge Mansmann concluded that the coal conveying activity at issue was part of the process of electrical power generation, rather than coal preparation. Id. at 1517.

I also note that, although the Commission's opinion states that its holdings are consistent with Pennsylvania Electric (slip op. at 4), the opinion in fact contradicts the Third Circuit's reasoning in Pennsylvania Electric. The Third Circuit found plain the language of sections 3(h)(1) and 3(i) of the Mine Act, which define "coal or other mine" and "work of preparing the coal." 969 F.2d at 1503-04. The Commission apparently does not find that statutory language to be plain. It relies on Commission case precedents in Westwood Energy Properties, 11 FMSHRC 2408 (December 1989), and in Pennsylvania Electric Co., 11 FMSHRC 1875 (October 1989)("Penelec"). Slip op. at 4. Neither Commission case cited based its reasoning on the plain language of the relevant statutory language; both cases set forth interpretations of that language, citing in turn earlier Commission precedent in Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (January 1982). Westwood Energy Properties, 11 FMSHRC at 2414; Penelec, 11 FMSHRC at 1880-81. The Third Circuit's holding admitted no "nature of the operation test" as set forth in Elam nor any limitation on jurisdiction by MSHA over persons or facilities engaged in coal preparation, other than a regulation in place that covers the specific working conditions at issue. 969 F.2d at 1503-04.

The Commission's opinion is further at variance with Pennsylvania Electric in that it examines, and finds adequate, the advance notice that MSHA provided to the operator before it asserted jurisdiction over the Cambria Co-generation Facility ("Cambria"). Slip op. at 5. The Third Circuit's holding admitted no such examination of MSHA's enforcement actions:

> [T]he plain language of 4(b)(1) [of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(1)(1988)] indicates that the enforcement history surrounding a regulation is not relevant to the issue of whether another agency preempts OSHA.

969 F.2d at 1505.

I share my colleagues' concern that indications of conflicting safety enforcement authority by the Secretary of Labor through MSHA and OSHA create confusion, compromise safety and reduce productivity, as shifting policies force operators to modify facilities and work processes.(Footnote 1) Slip op. at 6.

Results of the Third Circuit's expansion of MSHA's jurisdictional reach in Pennsylvania Electric remain to be seen. The Third Circuit's decision in effect requires MSHA to inspect all facilities performing any of the coal preparation activities listed under section 3(i) of the Mine Act. MSHA may comply with that decision by increasing the variety and the number of facilities it inspects, pursuant to the inspection requirement of section 103(a) of the Mine Act, 30 U.S.C. 813(a). Alternatively, MSHA may attempt to continue its policy of exercising its jurisdiction selectively, as exemplified by its assertion of jurisdiction over Cambria and its agreement not to assert jurisdiction over the admittedly similar Westwood facility (see slip op. at 4 n.6; Westwood Energy Properties, 12 FMSHRC 1625, 1626 (August 1990)(ALJ)). Unfortunately, the record in this case contains no suggestion that a reasoned resolution of overlapping safety enforcement schemes within the Department of Labor may be forthcoming.

Arlene Holen, Chairman

---

1 Counsel for the Secretary attempted to allay the Commission's concern, expressed at oral argument, and stated, "this case serves as a public notice of the Secretary's policy regarding enforcement over coal preparation facilities." Oral Arg. Tr. at 54. Counsel acknowledged, however, in Response to the Commission's Request for Information, that confusion will likely continue:

> If an operator is uncertain as to which agency's standards will apply to its operations, of course, it can eliminate any risk of noncompliance by complying with the stricter of the two standards where compliance with one standard automatically accomplishes compliance with both standards -- or, where it does not, by complying with both standards directly. In the alternative -- and obviously more practical -- an operator who is uncertain as to which agency's standards will apply to its operations can simply approach MSHA and OSHA and ask. Indeed, an operator planning to construct a new facility can approach MSHA and OSHA and ask for clarification before it even constructs the facility.

S. Response at 3. At Cambria, early discussions did not forestall confusion.