FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

November 3, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 99-272
JUSTIS SUPPLY & MACHINE SHOP	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), in which Justis Supply & Machine Shop ("Justis") challenges three citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). At issue is whether Administrative Law Judge Richard Manning correctly determined that the site at which Justis was working on a dragline was a "mine" within the meaning of section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1).[1] 22 FMSHRC

[1] Section 3(h)(1) provides:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

544 (Apr. 2000) (ALJ). For the reasons that follow, we affirm the judge's determination and therefore uphold the citations and penalties.

I.

Factual and Procedural Background

BHP Minerals, Inc. ("BHP") operates the Navajo Mine, a surface coal mine in San Juan County, New Mexico. 22 FMSHRC at 544. BHP uses draglines[2] at the mine to remove topsoil and other material to expose the coal seam. *Id.* According to MSHA Inspector Peter Saint, BHP had a total of three draglines at the Navajo Mine, including the dragline involved in this proceeding, at the time of the trial. Tr. at 16.

On January 5, 1999, MSHA Inspector Saint was conducting a regular inspection at the Navajo Mine. 22 FMSHRC at 544. As part of that inspection, he went to an area where a dragline was being assembled. *Id.* The site was about one mile from where coal was being mined. *Id.* An earthen berm surrounded the dragline site. *Id.* The site was accessible either by a public road or a private road that ran directly from the mine. *Id.*

The dragline was being assembled by a contractor, CDK. *Id.* CDK, in turn, contracted with Justis to perform cutting and welding services. *Id.* at 544-45. Employees of Justis, which operated out of Farmington, New Mexico, brought a welding truck to the site. *Id.* at 545. The first time Justis personnel arrived at the site, they came over the road from the mine. *Id.* BHP security personnel examined Justis' trucks and gave Justis employees a training handbook. *Id.* at 546. Thereafter, Justis employees entered and exited the dragline assembly site over the public road. *Id.* at 545. Neither CDK nor Justis performed any work at the site other than on the dragline. *Id.* at 546.

MSHA Inspector Saint came to the site over the mine road. *Id.* at 545. While at the site, he inspected several pieces of equipment that belonged to Justis, including a welding truck. *See id.* Justis' truck was not equipped with a backup alarm. *Id.* at 549. It had a gas powered welder mounted behind the cab. *Id.* Oxygen and acetylene tanks were mounted on the bed of the truck, and tool boxes were attached to the sides of the bed. *Id.* This equipment obstructed the rear view from the cab of the truck. *Id.* The rear of the truck was used as a workbench and was equipped with a vise and rack. *Id.* The truck was parked front end first about 40 feet from the dragline, and CDK and Justis employees were working in the area. *Id.* The inspector issued a

[2] A dragline is "[a] type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket and dumps the material on a spoil bank, in a hopper, or on a pile." American Geological Inst., *Dictionary of Mining, Mineral, and Related Terms*, 167 (2d ed. 1997).

citation charging a violation of 30 C.F.R. § 77.410(a)(1)[3] for failing to provide the truck with a back-up alarm when it had an obstructed rear view.[4] *Id.* at 548. The inspector issued two additional citations.[5] *Id.* at 550-51.

The Secretary issued a proposed assessment of civil penalties that Justis contested, and a hearing was held. Relying on section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and its legislative history, the judge concluded that the dragline site where Justis employees worked fell within the Act's definition of a "coal or other mine." 22 FMSHRC at 546. He noted that the only activity at the site was the assembly of the dragline to be used for mining at the Navajo Mine. *Id.* The judge distinguished the factual setting in this case from one involving a commercial welding operation, which was open to the public, on a site adjacent to a mine. *Id.* at 547. He concluded that, except for the fact that an independent contractor was involved, the case was similar to *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000), where the Commission held that a supply shop, not located at a mine site, was a "mine" because the Mine Act's definition includes "facilities and equipment" used in or to be used in mining. *Id.* The judge reasoned that, if BHP employees were assembling the dragline at the site, they would clearly be subject to Mine Act jurisdiction. He held that the fact that those activities were being performed by independent contractors should not change the result. *Id.* Based on his determination that the dragline site was a mine, the judge concluded that Justis was an "operator" under section 3(d) of the Mine Act, 30 U.S.C. § 802(d), because it was an "independent contractor performing services or construction at [a] mine." *Id.* at 548.

The judge affirmed the violations charged in the three citations. *Id.* at 548-52. With regard to the citation charging Justis with a failure to provide a back-up alarm on its welding truck, the judge rejected Justis' contention that the truck was a "service vehicle" within the meaning of MSHA's Program Policy Manual ("PPM"), concluding that the PPM did not exclude from the requirements of section 77.410(a)(1) the truck of an independent contractor, when the truck was an integral part of the welding service that Justis provided. *Id.* at 549.

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[3] Section 77.410(a)(1) provides in pertinent part: "Mobile equipment, such as . . . trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse . . . ."

[4] The inspector designated the violation as significant and substantial. *Id.* at 548. The judge upheld that designation (*id.* at 550), and Justis has not challenged that determination on review.

[5] The inspector issued a second citation when he located a hand-held grinder that had a trigger lock that allowed it to run when there was no pressure on the trigger. *Id.* at 550. He issued a third citation as a result of the three-ton hoist on the back of the welding truck not having a safety latch on the hook to prevent cable from coming off the hook. *Id.* at 551. These two citations are challenged only on jurisdictional grounds.

II.

Disposition

Justis argues that the assembly site was not a mine and that its employees at the dragline site were not "miners" because they were not in frequent contact with the extraction site "and the accompanying dust exposure." J. Br. at 4. Relying on cases arising under Title IV of the Mine Act, which governs black lung benefits, Justis contends that its employees would be ineligible for black lung benefits because they are not "miners," and, therefore, estoppel prevents the Secretary from taking a contrary position in this proceeding. *Id.* at 4-6; J. Rep. Br. at 4-5. Further, Justis asserts that section 3(h)(1) of the Mine Act is unconstitutionally vague because it fails to give Justis fair warning of when and where its jurisdiction applies. J. Br. at 6-8; J. Rep. Br. at 5-8. Justis continues that Congress did not intend that vendors of welding services be covered by the Mine Act. J. Br. at 8-9. Justis further argues that the judge erroneously concluded that the site where the dragline was being constructed was a "mine" even though there was no evidence in the record establishing the identity of the owner or lessor of the site. *Id.* at 9-10; J. Rep. Br. at 1-2. Justis continues that the judge incorrectly assumed that CDK was not a trespasser and that CDK and Justis were invitees of the operator of the Navajo Mine. J. Br. at 10; J. Rep. Br. at 1-2. Similarly, Justis contends that there was no evidence establishing that the dragline was being assembled at the CDK site for use at the Navajo Mine. J. Br. at 10-12; J. Rep. Br. at 2-3. Justis also argues that there was no evidence to establish that the only work done at the assembly site was on the dragline. J. Br. at 12. Finally, Justis argues that its welding truck was exempted from section 77.410 by the Secretary's PPM, because it was a "service" vehicle. J. Br. at 9, 12-14.

The Secretary argues that the plain language of section 3(h)(1) of the Mine Act establishes the dragline assembly site is a "mine." S. Br. at 6-9. The Secretary asserts that cases addressing black lung benefits are not controlling, pointing out that the definition of a "mine" in section 3(h)(2), which applies to black lung cases, has a "geographical component" that section 3(h)(1) does not have — requiring that structures, facilities, machinery, and other property be "placed upon, under, or above the surface of such land . . . ." *Id.* at 10-13. The Secretary also notes that the courts and the Commission have repeatedly held that the definition of a "mine" should be applied expansively. *Id.* at 12-14. Alternatively, the Secretary argues that her interpretation of the definition of "mine" should be given deference. *Id.* at 15-16. The Secretary contends that Justis' argument that the Mine Act is unconstitutionally vague was not raised before the judge and, therefore, should not be considered by the Commission. *Id.* at 16. The Secretary continues that, in any event, Justis had adequate notice of Mine Act jurisdiction. *Id.* at 16-19. The Secretary further contends that the judge's factual findings are supported by substantial evidence. *Id.* at 19-22. Finally, the Secretary argues that Justis' welding truck is not within the exception in the PPM, which covers "service vehicles" making visits or deliveries to a mine. *Id.* at 22-25.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).

The definition of a mine is "broad," "sweeping," and "expansive." *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) ("[T]he 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 — the word means what the statute says it means.").[6] Under section 3(h)(1), "coal or other mine" includes "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).

We conclude that the language of the statute is clear. In light of the Mine Act's expansive language, we further hold that the judge properly determined that the dragline assembly site is a mine under the definition of section 3(h)(1). *See* 22 FMSHRC at 546. The record clearly demonstrates that the dragline was equipment "to be used in" mining coal. Saint testified without contradiction that at the time of the hearing, the dragline was in operation at the Navajo Mine. Tr. 19. Justis welding foreman Bob Sanders also testified that the dragline was to be used at the mine. Tr. 96; *see also* Tr. 60. Consequently, there is Mine Act jurisdiction because a "mine" includes "equipment . . . to be used in" mining operations at BHP's Navajo Mine.

This conclusion is consistent with our reasoning in *Jim Walter Resources*, where we held that a common supply shop for several mines that was not located at any of the mines was subject to Mine Act jurisdiction. In that case we noted that "the hazards to which mines are exposed are not limited to the hazards of underground mines, but include improperly maintained equipment and supplies that are used in mining." 22 FMSHRC at 27.

Justis argues that the judge erred in concluding that Justis and CDK were invitees at the assembly site. J. Br. at 10. Although there was testimony in the record regarding BHP

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[6] In addition, the legislative history of the Mine Act emphasizes that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

ownership of the dragline assembly site (Tr. 14-15), the judge did not make a finding on this issue. Instead, he found that "CDK was not a trespasser on the land. CDK was the principal employee at the site and exercised control over the site." 22 FMSHRC at 546. Substantial evidence supports the judge's findings.[7] Saint and Sanders both testified that CDK was a general contractor responsible for assembling the dragline and that Justis was retained by CDK to perform cutting and welding. Tr. 16-18, 55, 96. Further supporting the integral relationship between Justis, CDK and BHP is Sanders' testimony that Justis employees were required to report to the BHP security personnel upon coming to the site for the first time in order to have a vehicle inspection. Tr. 82, 90. BHP personnel told Sanders that he would be working at the CDK site and directed him to it. Tr. 90. In addition, BHP security personnel provided training to Justis personnel when they entered the mining area. Tr. 97.

Further, the judge's rejection of Justis' challenge based on lack of evidence of ownership is consistent with Commission precedent. In *W. J. Bokus Industries, Inc.*, 16 FMSHRC 704, 707-708 (Apr. 1994), the Commission rejected "insufficient evidence of ownership" of the equipment in question as a basis for denying jurisdiction where the evidence showed that the equipment was "used or to be used in mining and that, irrespective of ownership, the cited conditions would affect miners." 16 FMSHRC at 708. In sum, there was more than adequate evidence to support the judge's finding that CDK was not a trespasser and was properly at the assembly site.

Finally, Justis argues that there was no evidence to support the judge's finding that all work done at the CDK site was done on the dragline. J. Br. at 9, 12. However, Justis' own witness, Sanders, when asked to describe the work that Justis employees were performing at the site, identified only cutting and welding on the dragline. Tr. 82-83, 94-95. Similarly, Sanders testified that the site was used solely by CDK and Justis for the assembly of the dragline. *See* Tr. 91, 93, 96. Therefore, in the absence of any countervailing testimony, the judge was well warranted in concluding that the only activity at the site was construction of the dragline.

In regard to Justis' reliance on cases dealing with black lung benefits, it is apparent that a different definition of "coal mine" applies to those cases. Section 3(h)(1), which defines "coal or other mine," applies only to Title I of the Mine Act. Section 3(h)(2),[8] which defines "coal mine,"

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[7] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] 30 U.S.C. § 802(h)(2) states in pertinent part: "'[C]oal mine' means an area of land and all structures, facilities, machinery, tools, equipment, . . . and other property . . . placed upon, under or above the surface of such land . . . used in, or to be used in . . . extracting . . . coal . . . ."

applies to Title IV, the black lung benefits program. The Commission has previously considered and rejected reliance on cases arising under Title IV because these cases "lack precedential value in resolving . . . Mine Act jurisdictional dispute[s]." *Pennsylvania Electric Co.*, 11 FMSHRC 1875, 1881-82 n.7 (Oct. 1989), *aff'd on other grounds,* 969 F.2d 1501 (3rd Cir. 1992). In *Westwood Energy Properties*, 11 FMSHRC 2408 (Dec. 1989), the Commission explained that the financial scheme of the black lung benefits program is based on coal production; therefore, the specified activities in section 3(h)(2) must be tied to coal production. *Id.* at 2415 n.5. As the Commission concluded, the black lung benefits cases do not provide a basis from which to extrapolate an exemption from Mine Act coverage. *Id.*

Moreover, under section 3(g) of the Mine Act, 30 U.S.C. § 802(g), a "miner" is "any individual working in a coal or other mine." Thus, contrary to Justis' apparent assertion, an individual need not be "extracting coal" or "exposed to coal dust" in order to be a "miner" under the Act. *See* J. Br. at 4. Accordingly, Justis' argument that its employees were not "'miners' in the broadest sense of the word" is unavailing. *Id.*

In its alternative argument, assuming arguendo Mine Act jurisdiction, Justis challenges only the citation involving its failure to equip its welding truck with a backup alarm. It contends that the truck is within an exception from the backup alarm requirement in the Secretary's PPM, which exempts from the regulation's requirements service vehicles making visits to surface mines. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 77 Subpart E — Safeguards for Mechanical Equipment, at 171 (1992). The judge concluded that the welding truck was not a service truck making visits to the mine because it was a truck belonging to an independent contractor providing welding services at a mine. 22 FMSHRC at 549.

The applicable regulation, section 77.410(a)(1), requires pickup trucks with obstructed views to have audible backup alarms. The PPM limits application of the regulation by exempting service vehicles making visits to the mine.[9] Saint testified that the exception covered UPS and other delivery trucks that do not perform work at the mine. Tr. 56, 76-78. Clearly, the welding truck was not at the site on a short term basis to make deliveries of equipment or employees to the mine. Rather, as Saint further testified, the welding truck, which had an obstructed view, was present at the assembly site throughout the day and served as a portable work station for cutting and welding on the dragline with employees working behind it. Tr. 25-29. Therefore, the judge properly concluded that the welding truck did not fall within the PPM's exception.

[9] The PPM, although not binding on MSHA, is regarded as evidence of MSHA's policies and practices. *Coal Employment Project*, 889 F.2d at 1130 n.5.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that the dragline assembly site was a mine and uphold the citations and penalties.

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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