FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 22, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 95-382-R
	:	PENN 95-383-R
RNS SERVICES, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Jordan, Chairman; Holen, Marks and Riley, Commissioners

This consolidated contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves the validity of two citations issued to RNS Services, Inc. ("RNS") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") alleging violations of 30 C.F.R. §§ 77.1713(c) and 77.1000 (1995)[1] at RNS's No. 15 coal refuse pile. The question before us is whether the No. 15 pile is a "mine" under the Mine Act. Administrative Law Judge Avram Weisberger vacated the citations. 17 FMSHRC 1284 (July 1995) (ALJ). He concluded that RNS was not engaged in "the work of preparing coal" and that consequently the Mine Act did not apply to the activities of RNS at the site. 17 FMSHRC at 1288, 1290. The Commission granted the Secretary's petition for discretionary review on the jurisdictional issue. For the reasons discussed below, we reverse.

I.

Factual and Procedural Background

The RNS No. 15 coal refuse pile, in Barr Township, Pennsylvania, occupies part of the site of the abandoned Lancashire No. 15 and No. 24-B underground coal mines and adjacent coal preparation plant. Tr. 17-21; 17 FMSHRC at 1285. RNS purchased the site in January 1995

[1] Section 1713(c) requires recording the results of the daily inspection of a surface coal mine in an approved record book; section 77.1000 requires the operator of a surface mine to establish and follow a ground control plan. 30 C.F.R. §§ 77.1713(c) and 77.1000.

from the Lancashire Coal Co. 17 FMSHRC at 1285. The No. 15 pile was created between 1914 and the mid 1940s and was abandoned in the 1960s. Tr. 25, 146-49; Resp't Ex. 5. When the mines were active, coal was cleaned, screened, washed and broken at an adjacent preparation plant. Tr. 21; 17 FMSHRC at 1285. The prepared product was marketed as metallurgical coal that generally had a value of 13,000 to 14,000 BTUs. *Id.* Refuse material from the preparation plant was deposited on several adjacent refuse piles, including the No. 15 pile. *Id.*[2]

Since May 1995, RNS has operated the site pursuant to a "No Cost Government Financed Reclamation Contract" between RNS and the Commonwealth of Pennsylvania. Resp't Ex. 6; Tr. 25-26. In exchange for receiving the coal refuse at no cost, RNS is required by the contract to remove the refuse and reclaim the site at no cost to the state. 17 FMSHRC at 1286; Resp't Ex. 6, p.5. The contract states that RNS is not authorized "to remove or mine coal" from the pile, and that "the material to be removed . . . is coal refuse as defined at 25 Pennsylvania Code § 90.1 and is not bituminous or anthracite coal." Resp't Ex. 6, p.4. Pursuant to a long-term contract with Cambria Co-Gen Co., RNS hauls the coal refuse to the Cambria co-generation facility in Ebensburg, Pennsylvania, which is operated by Air Products and Chemicals, Inc. 17 FMSHRC at 1285; Tr. 45, 155-56. The Cambria co-generation facility generates energy in the form of electricity and steam. 17 FMSHRC at 1285. The contract price for the coal refuse is a flat fee and is not based on the amount delivered to Cambria. *Id.*

The coal refuse pile is 1,200 feet long, 500 feet wide and 90 feet high. 17 FMSHRC at 1285; Tr. 177. Large rocks are removed from the pile by a hydraulic excavator, Tr. 182, which also scoops the refuse and loads it into haul trucks. Tr. 70, 153. Prior to loading, RNS also uses a water truck and, occasionally, a bulldozer and backhoe. 17 FMSHRC at 1286; Tr. 153. Haul trucks from the No. 15 site transport coal refuse to a hopper at the Cambria plant, where it is first blended with refuse from other RNS piles in order to achieve a product with the appropriate sulphur content for burning at Cambria, and then is broken, screened and sized. Tr. 46-51; 169-71.[3] Unsuitable material is stockpiled and ultimately transported to the RNS Lancashire No. 25 dump site, while usable material is stored and ultimately burned at Cambria. 17 FMSHRC at 1285. Tr. 46-51. The average content of the material in the refuse pile as tested by RNS is about 7000 BTUs after processing. Tr. 165-66. MSHA has jurisdiction over operations at the Cambria facility. *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428 (December 1993), *aff'd mem.*, 37 F.3d 1485 (3d Cir. 1994).

MSHA had material from the pile tested; the results indicated that the refuse has the characteristics of coal. 17 FMSHRC at 1286; Tr. 122-25; Gov't Ex. 19. Neil Hedrick, the president of RNS, testified that the refuse contains "particles of coal." Tr. 172.

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[2] The preparation plant ceased operation prior to 1968 and was probably dismantled between 1971 and 1973. 17 FMSHRC at 1285; Resp't Ex. 5.

[3] Cambria uses only coal refuse from RNS sites. Tr. 51-54.

On June 16, 1995, upon an inspection of the No. 15 coal refuse pile, MSHA Inspector Gerry L. Boring issued Citations Nos. 3713378 and 3713379 alleging violations of sections 77.1713(c) and 77.100, respectively. Gov't Exs. 17, 18; 17 FMSHRC at 1286. RNS did not dispute the factual assertions contained in the citations and agreed that it violated the cited standards, but challenged MSHA's jurisdiction over the No. 15 site. 17 FMSHRC at 1286. The judge held that the No. 15 site does not fall under the definition of "coal or other mine" contained in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1),[4] because "the work of preparing coal" as defined in section 3(i), 30 U.S.C. § 802(i),[5] did not take place at that location. 17 FMSHRC at 1288, 1290. The judge stated:

> [W]ith the exception of the removal of coal, none of the activities set forth in Section 3(h)(2)(i) [sic] of the Act are performed at the site. The sole activities performed at the site, those of the removal of material by a hydraulic excavator, the loading of the material on

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[4] Section 3(h)(1) of the Mine Act states in part:

> "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 passage-ways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impound-ments, retention dams, and tailings ponds, on the surface or under-ground, 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 facili-ties.

30 U.S.C. § 802(h)(1).

[5] Section 3(i) of the Mine Act states:

> "work of preparing the coal" means [1] the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine[.]

30 U.S.C. § 802(i).

> trucks, and the transporting of material to the Cambria facility are not activities set for [sic] in section 3(h)(2)(i) [sic].

Id. at 1288. The judge sustained the contests and dismissed the citations. 17 FMSHRC at 1290.[6]

II.

Disposition

The Secretary contends that the judge erred in concluding that RNS was not engaged in the work of preparing coal. S. Br. at 4-9. He asserts that the judge erred in determining that "loading" was not an activity covered by the definition of "work of preparing the coal" contained in section 3(i). *Id.* at 6-7. The Secretary further argues that the separation of large rocks from the coal refuse before loading constitutes "sizing" and "cleaning," activities also listed in section 3(i). S. Br. at 7. He contends that the judge's decision is at variance with Commission and court precedent holding that the transportation and loading of coal and coal refuse constitute the type of work usually performed by a mine operators, and therefore satisfy the definition of "work of preparing the coal." S. Br. at 7-9.

RNS argues that a two-part test applies to the jurisdictional question: whether the operator performs any of the coal preparation activities listed in section 3(i), and whether such preparation work is usually performed by a coal mine operator. R. Br. at 9-10. RNS contends that it is not engaged in the "work of preparing the coal" at the No. 15 site because the pile contains "coal waste" rather than "coal." R. Br. at 10-11. RNS further asserts that, because it engages only in "loading" and transporting, this case is distinguishable from cases where the Commission has upheld Mine Act jurisdiction over coal refuse processing. R. Br. at 11-14. RNS maintains that the use of the hydraulic excavator to remove large rocks from the coal waste does

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[6] The judge also concluded that the No. 15 refuse pile does not constitute a "coal or other mine" because it is not "lands . . . structures, facilities . . . or other property . . . used in or resulting from the work of extracting such minerals from their natural deposits in non-liquid form." *Id.* at 1288-90, quoting 30 U.S.C. § 802(h)(1). Relying on *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388 (3d Cir. 1992), the judge noted that the definition of "coal or other mine" in the context of coal extraction from its natural deposit encompasses lands "resulting from" such activity, and is therefore broader than the definition of "coal or other mine" in the context of coal preparation, which does not contain the "resulting from" language. 17 FMSHRC at 1289. The Secretary challenged this conclusion in his Petition for Discretionary Review (PDR at 9-11), but did not argue the point in his brief. The Commission need not address this argument because the Secretary has abandoned it. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

not constitute "sizing" or "cleaning," that transporting material is not one of the elements of coal preparation listed in section 3(i), and that "loading" by itself is not adequate to justify MSHA jurisdiction. *Id.*

Section 4 of the Mine Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, "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). Section 3(i) of the Mine Act defines "work of preparing the coal" to include "[1] sizing, cleaning . . . and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. § 802(i).

The definitions of coal mine and coal preparation in sections 3(h) and 3(i) are "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). Congress intended 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* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

In finding that "none of the activities set forth in Section 3(h)(2)(i) [sic] of the Act are performed at the site," the judge concluded that "sizing" and "cleaning" of coal within the meaning of section 3(i) are not being done at the No. 15 site. Substantial evidence supports the judge's conclusion.[7] "Sizing" consists of "[t]he process of separating mixed particles into groups of particles all of the same size, or into groups in which all particles range between definite maximum and minimum sizes." U.S. Dep't of the Interior, *Dictionary of Mining, Mineral and Related Terms* 1020 (1968). "Cleaning, dry" is defined as "[t]he mechanical separation of impurities from coal by methods which avoid the use of a liquid." *Id.* at 216. The limited activities of the excavator in excluding large rocks from the haul trucks support the judge's conclusion that RNS is not engaged in "sizing" or "cleaning" at the No. 15 site.[8]

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[7] The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 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 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[8] The Secretary also argues that the use of a 4 inch grizzly to separate timbers from coal refuse constitutes "'sizing,' 'cleaning,' or 'other work of preparing . . . coal' . . . ." S. Br. at 7

We turn next to the question of whether the few activities that do take place at the No. 15 pile are sufficient to bring that site under the jurisdiction of the Mine Act. In *Pennsylvania Electric Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992) ("*Penelec*"), *aff'g* 11 FMSHRC 1875 (October 1989), the sole issue was whether Mine Act jurisdiction attached to the head drives of conveyors transporting coal to an electric power plant for processing. The court held that "[u]nder the functional analysis we are to employ when giving the 'broadest possible' scope to Mine Act coverage, . . . 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.'" *Id.* at 1503 (citations omitted).

The functional analysis of *Penelec* was adopted by the court in *United Energy Services v. MSHA*, 35 F.3d 971 (4th Cir. 1994). In *United Energy*, coal waste from a refuse pile at a working mine was transported via conveyors to an adjacent electric power plant where it was sized, crushed, and ultimately burned for fuel. 35 F.3d at 973. As in *Penelec*, the court in *United Energy* dealt with the issue of whether the coal transportation equipment fell under MSHA jurisdiction. The Fourth Circuit stated that the operator's activities "involve the transportation of coal to the preparation facility and thus are part of the 'work of preparing coal.'" *Id.* at 975. Citing *Penelec*, the court upheld the Commission judge's decision sustaining MSHA's jurisdiction. *Id.*

Because we decline RNS's urging that *Penelec* be "rejected," *see* R. Br. at 10 n.9, we reverse the judge's determination that MSHA lacks jurisdiction over the No. 15 site. The judge erred in concluding that loading is not one of the coal preparation activities listed in section 3(i). Further, in both *Penelec* and *United Energy*, the courts of appeals held that the transportation of coal or coal waste, by itself, is sufficient to trigger Mine Act jurisdiction, despite the fact that "transporting" is not one of the activities listed in the first clause of section 3(i). Under the functional analysis of *Penelec*, "*each* of the activities listed in section 3(i) . . . subjects anyone performing that activity to the jurisdiction of the Mine Act, if MSHA has promulgated a regulation governing the working conditions at issue." *Air Products*, 15 FMSHRC at 2435 (Commissioner Doyle, concurring) (citation omitted) (emphasis supplied). We therefore conclude that the judge erred in determining that transportation of coal is not included in the definition of the "work of preparing coal."

(footnote omitted). As RNS points out, however, the judge's finding that a 4 inch grizzly was used at the No. 15 site, 17 FMSHRC at 1286, is not supported by substantial evidence. R. Br. at 13. The only record evidence on this point is the testimony of MSHA supervisory inspector Biesinger that the contract between RNS and the Commonwealth of Pennsylvania permits the use of a grizzly. Tr. 36-37. The contract does not address use of a grizzly, the photographic evidence does not show the presence of a grizzly at the No. 15 site, and the testimony describing RNS's activities at the No. 15 site does not include use of a grizzly. Resp't Ex. 6; Gov't Exs. 5-14; Tr. 40-45.

We also reject RNS's argument that section 3(i) has not been satisfied because the No. 15 pile contains only "coal refuse" and not "bituminous coal, lignite or anthracite" specified in section 3(i). *See* R. Br. at 10-11. RNS concedes that the pile contains "coal 'particles'" but contends that under the contract between RNS and the Commonwealth of Pennsylvania, the material is not considered "coal." R. Br. at 11. The judge, however, did not rely on this distinction and specifically found that the coal refuse has "the characteristics of coal," 17 FMSHRC at 1286. Moreover, the Commission and courts have not read into section 3(i) a requirement that the processed material consist only of run-of-mine coal. The processing of refuse and other material containing small amounts of coal has been held to constitute the "work of preparing coal." *E.g.*, *United Energy*, 35 F.3d at 975 (transportation of coal waste constitutes "work of preparing coal"); *Marshall v. Stoudt's Ferry*, 602 F.2d at 592 ("process of separating from the dredged refuse a burnable product 'akin' to coal, which is then sold as a low-grade fuel, brings the company within the Act's coverage . . . ."); *see also Alexander Bros.*, 4 FMSHRC 541, 544-45 (April 1982) (rejecting argument that "work of preparing coal" under Coal Act did not include processing "refuse 'which happens to contain a small amount of coal'").

We note that the loading and hauling of coal waste as performed at the No. 15 site are de minimis activities for purposes of determining MSHA jurisdiction. Contrary to the statement of the Secretary at oral argument (Oral Arg. Tr. at 39 (March 14, 1996)), if MSHA has jurisdiction over coal refuse piles, it may not waive it. "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." *Air Products*, 15 FMSHRC at 2435 n.2 (Commissioner Doyle, concurring) (emphasis added); *see also id.* at 2438 (Commissioner Holen, dissenting). To the extent the Secretary has discretion in his exercise of Mine Act jurisdiction, that discretion applies to mineral milling (30 U.S.C. § 802(h)(1)), not to coal preparation activities.[9]

[9] Commissioner Holen questions the wisdom of MSHA's expenditure of scarce government resources to inspect a pile of coal waste that has lain dormant for decades where the only activities are loading and hauling to a power plant for further processing.

III.

Conclusion

For the foregoing reasons, pursuant to *Penelec*, we reverse the judge's determination as to jurisdiction. Accordingly, the citations are affirmed.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner