No. 14-

IN THE

Supreme Court of the United States

SHAMOKIN FILLER COMPANY, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Federal Mine Safety and Health Act's definition of "the work of preparing coal" includes purchasers of processed and prepared coal.

2) Whether the Court of Appeals should have remanded to the Federal Mine Safety and Health Review Commission to consider the evidence that the statute had been inconsistently applied.

PARTIES TO THE PROCEEDING BELOW

Petitioner Shamokin Filler Company was the petitioner in the court of appeals.

Respondents Secretary of Labor, Mine Safety and Health Administration, and the Federal Mine Safety and Health Review Commission, were respondents in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Shamokin Filler Company, Inc. ("Shamokin") is a Pennsylvania corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shamokin Filler Company, Inc. ("Shamokin") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at _ F.3d _, 2014 WL 5801611 (3d.Cir. July 11, 2014)(Appendix B). The decision of the Federal Mine Safety and Health Review Commission is reported at 34 FMSHRC 1897 (Aug. 28, 2012) (Appendix F). The decision of the administrative law judge is reported at 33 FMSHRC 725 (March 11, 2011)(Appendix G). The evidentiary Orders of the administrative law judge issued on October 27, 2010 are reproduced at Appendices H and I.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2014, and the Petition for Panel Rehearing was denied on September 8, 2014. This Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act"), are set out in Appendix J. The Sections are subsections (h) and (i) of Section 3 of the Mine Act, 30 U.S.C. § 802(h)–(i) and Section 4 of the Mine Act, 30 U.S.C. § 803. (Appendix

J). Also included are relevant provisions of the Title IV of the Mine Act (Black Lung Benefits Act), 30 U.S.C. § 901 *et seq.* Section 902(d) is reproduced at Appendix J.

STATEMENT OF THE CASE

The Federal Mine Safety and Health Act of 1977 ("Mine Act") applies to "coal or other mines." 30 U.S.C. § 802(h)(1). Lands, structures, other property and equipment that are defined as a "coal or other mine" are subject to the standards, regulations and enforcement of the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA"). Manufacturing facilities and many other workplaces that are not within the scope of coverage of the Mine Act are subject to separate health and safety standards and enforcement under the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*

Section 3(h) of the Mine Act defines a "coal or other mine" that is subject to the Mine Act. 30 U.S.C. § 802(h). The statute's lengthy definition is provided in Appendix J. The Mine Act's coverage has been summarized as "refer[ring] to three different mining activities: 'extracting' minerals; 'milling' minerals; and 'preparing coal or other minerals.'" *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388, 390 (3d Cir.1992).

Shamokin does not do any "extraction" of coal or other minerals. Although early in the proceedings in this case the Secretary of Labor maintained that Shamokin's operation constituted "milling" minerals, that claim was not made before the Court of Appeals. The issue in the case is whether Shamokin's Carbon Plant comes within

the statute's third activity, specifically, whether it is "preparing coal" within the meaning of the statute.

The Mine Act defines the phrase "the work of preparing the coal" in Section 3(i). 30 U.S.C. §802(i) (hereinafter Section 802(i)). The entire definition is provided in Appendix J. This Petition seeks review of the Third Circuit's interpretation of Section 802(i), which conflicts with the interpretation of the subsection by other courts of appeals. The Third Circuit's interpretation conflicts with the interpretation by other courts of appeals in cases involving MSHA's enforcement jurisdiction, and also conflicts the interpretation in cases under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, to which the definition of "work of preparing the coal" in Section 802(i) applies.

Shamokin makes and sells concentrated, finely ground carbon to customers in other industries, primarily steel, rubber, glass, and chemicals. Shamokin's various carbon products are produced to meet customer specifications for characteristics such as carbon content, sulfur, ash, and moisture. Shamokin uses a variety of "ingredients," some of which include anthracite coal, coke byproducts from oil refineries and steel mills, carbon black, and graphite, based on availability, costs, and specifications. Shamokin (as well as several other carbon products manufacturers) is located in eastern Pennsylvania, near the remaining anthracite mines, and so uses mostly coal to produce its carbon products. Most of Shamokin's finished products are mixtures of coal and other products in which anthracite is the largest component but some products are made entirely of coal and others are entirely non-coal.

There is no dispute that all of the coal that Shamokin uses is purchased as "prepared coal," and that it has already been processed at a coal preparation facility, that is, prior to being purchased by Shamokin, the coal has been cleaned and screened to remove dirt and other material, and then crushed or broken into a uniform size.

Shamokin has historically been inspected by MSHA, and the previous owners of the company never questioned whether MSHA's jurisdiction was proper under the Mine Act. However, in 2009 the Carbon Plant came under new ownership, and the new owners became aware that other nearby companies, with similar operations and similar products to Shamokin's, had requested the Department of Labor to "transfer" jurisdiction of their carbon plants from MSHA to OSHA, because the carbon plants are more akin to "manufacturing" than "mining." The Department of Labor agreed to those requests, and relinquished jurisdiction of these plants to OSHA. Seeking similar treatment, in 2010 Shamokin requested that the Department of Labor transfer jurisdiction of its carbon products plant to OSHA. Notwithstanding the previous transfers, the Department of Labor denied Shamokin's request. Shamokin then contested MSHA's jurisdiction in defending itself in a subsequent enforcement action brought by MSHA.

Proceedings Below.

The administrative law judge (ALJ) to whom the case was assigned[1] conducted a hearing solely on the issue

1. Congress adopted a "split jurisdiction" model in the Mine Act. Congress created MSHA to issue standards and conduct

of jurisdiction. Prior to the hearing, the Secretary of Labor filed a Motion *in Limine* to exclude any evidence regarding enforcement at any workplace other than Shamokin's. The ALJ granted the Secretary's Motion, and excluded from the hearing any evidence regarding the Department of Labor's application of the statute to other carbon products plants, thereby denying Shamokin the opportunity to show that the Department of Labor acted arbitrarily in treating Shamokin differently than other carbon plants. In his written decision, the ALJ stated that he excluded all such evidence from the hearing because it was "irrelevant, and/or, if relevant, unduly confusing and misleading."

Regarding Shamokin's argument that its Carbon Plant was not engaged in coal preparation under the definition in Section 802(i), the ALJ concluded that Shamokin's "extensive use of coal…and the number and volume of coal-related activities" were factors in determining Mine Act coverage. 33 FMSHRC at 745 (Appx. G at 138a). The ALJ rejected Shamokin's argument that the language of Section 802(i), as well as case law, distinguished coal that has *already been* processed for sale or use, and is in the stream of commerce, from the "coal preparation" referred in Section 802(i). Instead, the ALJ stated that he applied a "functional analysis," which he did not specifically define, but would allow MSHA jurisdiction based on whether the employer was handling or processing coal in some manner,

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enforcement. *See* 29 U.S.C. § 557a. Congress also created the Federal Mine Safety and Health Review Commission as an independent commission to, among other things, adjudicate enforcement disputes. Commission hearings are conducted by an administrative law judge (ALJ) employed by the Commission. Review of ALJ decisions by the Commission is discretionary. 30 U.S.C. § 823(d)(2)(A)–(B).

rather than on the status of the coal (raw versus prepared) being handled or processed. 33 FMSHRC at 746 (Appx. G at 138a - 139a).

On review, the Commission accepted the ALJ's interpretation of Section 802(i). Referring to Shamokin's argument that "coal preparation" under the statute ends when raw coal has been prepared for sale and put in the stream of commerce as the "bright -line" test, the Commission claimed that the "Commission and courts have never held a bright-line distinction between facilities that handle raw coal as compared to facilities that handle processed, marketable coal." 34 FMSHRC at 1905 (Appx. F at 79a). The Commission also held that the ALJ properly excluded evidence of the Department of Labor's application of the statute to other carbon plants because, according to the Commission, such evidence is not relevant to whether Shamokin is covered by the Mine Act. 34 FMSHRC at 1907 (Appx. F at 82a).

In declining Shamokin's petition for review, the Court of Appeals for the Third Circuit stated that it did not find support in the statute for limiting "the work of preparing the coal" in Section 802(i) to the preparation of raw coal, before the coal enters the stream of commerce, because the words "raw or unprocessed or run-of-mine" do not appear in the statute. Instead of the "bright-line distinction" – as the Commission had described it - the Third Circuit stated that it applied a "functional analysis" to whether an entity which handles coal in some manner is covered by the Mine Act. The Third Circuit's "functional analysis" allows MSHA's jurisdiction to follow the coal much further down the stream of commerce than does the "bright line distinction." According to the Third Circuit,

its "functional analysis" would only exclude (from MSHA's jurisdiction) coal handling and processing "activities that are too far attenuated from the actual processing of coal and which are not 'critical' or 'integral' in preparation of receipt by the end user." _ F.3d _, 2014 WL 5801611, at *6 (3d.Cir. 2014) (Appx. B at 16a).

The basis for federal jurisdiction in the court of first instance is set forth in the Mine Act, 30 U.S.C. Sections 816 and 823.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS PROPER BECAUSE THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 802(i) OF THE STATUTE CONFLICTS WITH THE INTERPRETATION GIVEN BY OTHER CIRCUITS.

The Third Circuit's interpretation of Section 802(i) conflicts with the interpretation by the Court of Appeals for the Eighth Circuit, in *Secretary of Labor v. Associated Electric Cooperative*, 172 F.3d 1078 (8th Cir. 1999). In effect, the Eighth Circuit adopted what the Commission referred to as a "bright line distinction" between facilities that process raw and unprocessed coal from facilities that handle processed, marketable coal in the stream of commerce.

In *Associated Electric*, coal extracted from Wyoming's Powder River Basin was crushed to uniform size, approximately 2.5 inches, before being shipped. The coal was brought by rail and truck to Associated Electric's electric power-generating facility in Missouri, where the coal was further processed by sifting it to remove

debris and running the coal under magnets to remove any remaining scrap metal. It was then run either through a crusher that pulverized the coal, or a hammer mill that reduced the coal to quarter inch pieces.

MSHA claimed that the coal processing at the power plant was coal preparation which was subject to MSHA's jurisdiction. *Associated Electric*, 172 F.3d at 1080. The Eighth Circuit rejected MSHA's claim. "In essence, after a mine delivers processed, marketable coal to a utility any further operations to prepare the coal for combustion are not subject to MSHA jurisdiction. In the present case, Associated purchased coal that was processed into marketable form by the mine. Associated did not participate in transporting the coal from the mine, nor were its processing activities necessary to make the coal marketable. Therefore, its coal-handling operations are more properly characterized as 'manufacturing' than 'mining.'" *Associated Electric*, 172 F.3d at 1083 (citations omitted).

In support of its holding in *Associated Electric*, the Eighth Circuit cited a decision by the Fourth Circuit, *United Energy Services, Inc. v. Mine Safety & Health Administration*, 35 F.3d 971 (4th Cir.1994). In *United Energy Services*, MSHA only claimed to have jurisdiction over equipment that was used for handling and transporting raw, unprocessed coal, before the raw coal and coal waste arrived at a coal preparation plant where it was screened and crushed. MSHA did <u>not</u> claim jurisdiction over equipment used to transport the coal <u>after</u> it had been initially processed. The Fourth Circuit agreed that MSHA had jurisdiction over the equipment which was used to transport raw coal to the preparation

plant, but drew the jurisdiction line there, stating that "delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act." *United Energy Services*, 35 F.3d at 975.

The Third Circuit's rejection of the "bright line distinction" also conflicts with cases which have applied the definition of "work of preparing coal" in Section 802(i) for purposes of Title IV of the Mine Act, 30 U.S.C. § 901 *et seq.* ("Black Lung Benefits Act").[2]

In *Amax Coal Company v. Fagg*, 865 F.2d 916, 919 (7th Cir.1989), in reviewing a claim for black lung benefits by a bulldozer operator, the Court of Appeals for the Seventh Circuit reviewed the meaning of "coal preparation," and concluded that it did not continue once coal has been processed and entered the stream of commerce. "In arriving at a test for what is or is not the work of a miner, courts have distinguished between work accomplished before and after the finished coal product enters into the

2. Section 402(d) of the Black Lung Benefits Act, 30 U.S.C § 902(d), defines, in relevant part, a "miner" as "an individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." The definition of preparation of coal is supplied by Section 802(i).

The courts have frequently cited Black Lung Benefits Act decisions in cases interpreting Section 802(i) for purposes of MSHA's enforcement jurisdiction. *See, e.g., Pennsylvania Electric Co., v. FMSRHC*, 969 F.2d 1501, 1504 (3d Cir.1992); *RNS Services Inc. v. Secretary of Labor*, 115 F.3d 182, 184 (3d Cir. 1997); *United Energy Services*, 35 F.3d at 974-975. The Secretary of Labor also cites Black Lung Benefits Act cases interpreting Section 802(i) as applicable precedent for cases involving MSHA's jurisdiction. *See, e.g., Secretary of Labor v. Consolidation Coal Co.*, 35 FMSHRC 439, 454 (ALJ, Feb. 5, 2013).

stream of commerce. It is noteworthy that in all cases finding work not to be mining work, the activity took place after the finished coal had entered the stream of commerce." *Amax Coal*, 865 F.2d at 919 (citations omitted) (citing cases from the 3rd, 4th, 6th , 7th, and 11th Circuits).

Applying the Seventh Circuit's decisions in both *Amax Coal* and in *Director, OWCP v. Ziegler Coal Co.*, 853 F.2d 529, 536 n.10 (7th Cir.1988), the district court, in *Herman v. Commonwealth Edison*, 1998 WL 704335 (N.D.Ill., Sept. 28,1998) stated that "the Seventh Circuit's position is clear: once finished coal in a marketable state has been processed by the mine and placed in the stream of commerce, those who subsequently come in contact with it are not engaged in the 'work of preparing the coal.' " *Herman*, at *4.

The Department of Labor's *Judge's Benchbook* for adjudicating claims under the black lung benefits program states, without equivocation or exception, that "Coal is beyond the 'preparation' stage … when it is processed and prepared for the market." Office of Admin. Law Judges, U.S. Dep't of Labor, Judge's Benchbook: Black Lung Benefits Act 6.5 (2013) (*available at* http://www.oalj.dol.gov/LIBBLA.HTM) (citing *Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38 (4th Cir.1991)). Expressing support for the "bright line distinction" (although not using those words), the Sixth Circuit, in *Ray v. Brushy Creek Trucking Co.*, 50 Fed.Appx. 659, 661–662 (6th Cir. 2002) stated: "[a]nswering the question, 'at what point the 'preparation' of coal ends and the entry

of coal into the stream of commerce begins,' this court held in *Ratliff v. Chessie System R.R.*, (citation omitted) (unpublished disposition), that 'the final step of processing the coal (or 'preparation') ended when the coal was loaded into the railroad cars at the tipple; after that, the coal entered the stream of commerce and was no longer being 'prepared.'"[3]

The Third Circuit's interpretation of Section 802 (i) in this case also ignored the points made about the language of the subsection by Justice (then Judge) Alito, in *RNS Services v. Secretary of Labor*, 115 F.3d 182, 191 (3d Cir. 1997)(Alito, J., dissent). Justice Alito there explained that the last clause of the subsection ("as is usually done by the operator of the coal mine.") must be interpreted as referring to activities "done by the typical coal mine operator." *RNS Services*, 115 F.3d at 191. The "coal preparation" that is typical of a coal mine operator is preparation of raw, run-of-mine coal, in order to make the coal marketable and before it enters the stream of commerce.

3. The only court of appeals decision, prior to this case, which did not appear to observe the distinction that coal that has gone through a coal preparation plant is no longer being "prepared" is *Secretary of Labor v. Kinder Morgan Operating*, 78 Fed. Appx. 462 (6th Cir. 2003). That case involved a marine terminal used to load and unload coal destined for the Tennessee Valley Authority. Although the coal had been processed at the coal preparation plant, it had not been shipped to a customer, and in that sense was not yet in the stream of commerce. In contrast, Shamokin is not a shipper or transporter of coal on behalf of the customer, but is the purchaser of the coal, which it in turn uses (with other materials) to produce the carbon products for its customers.

Unlike the cases cited above, the Third Circuit's interpretation of Section 802(i) is inconsistent with the standard mining dictionary's definition of the term "coal preparation." The *Dictionary on Mining, Mineral and Related Terms* defines "coal preparation" as the processing of "raw coal." U.S. Bureau of Mines, U.S. Dep't of the Interior, Dictionary on Mining, Mineral & Related Terms (2d ed. 1996) (*available at* http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/).[4]

A great many businesses, from steel mills to chemical plants to electric utilities to transportation and shipping companies, and many others, purchase, use, transport, or otherwise handle coal. The "bright line distinction" has provided certainty that those businesses which purchase coal "in the stream of commerce" that has previously been processed by a coal preparation plant will not be subject to rules and regulations and expenses that are primarily intended for and directed at "traditional" coal mines. The Third Circuit's decision and interpretation is not only in conflict with those of other courts of appeals but creates unpredictability and uncertainty for employers and employees as to how far down the stream of commerce laws and regulations designed for coal mines may reach.

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4. The *Dictionary on Mining, Mineral and Related Terms* defines "coal preparation" as "[t]he various physical and mechanical processes in which raw coal is dedusted, graded and treated by dry methods (rarely) or water methods, using dense media separation (sink-float), jigs, tables, and flotation. The objective is the removal of free dirt, sulfur, and other undesirable constituents."

II. REVIEW IS PROPER BECAUSE THE COURT OF APPEALS' DECISION CONTRADICTS THIS COURT'S DECISION IN *FLORIDA POWER & LIGHT* AND IN OTHER CASES REQUIRING REMAND WHEN RELEVANT ISSUES WERE NOT CONSIDERED BY THE AGENCY.

At the hearing, the ALJ granted the Secretary of Labor's Motion *in Limine*, and prohibited any evidence concerning MSHA actions at any workplace other than Shamokin, including the Secretary's past decision to remove other carbon plants from MSHA's jurisdiction. As a result, Shamokin was not allowed to show that the Department of Labor's application of the statute was inconsistent and arbitrary.

The ALJ initially excluded evidence about the other carbon plants on two grounds. First, the ALJ ruled that several identified documents regarding other carbon plants were privileged. Second, the ALJ ruled that *any* evidence regarding other carbon plants was "irrelevant and/or, if relevant, unduly confusing and misleading." 33 FMSHRC at 729. (Appx. G at 103a). Subsequent to the hearing, the Secretary of Labor provided two of the previously withheld "privileged" documents to Shamokin's counsel in response to a Freedom of Information Act request. However, those documents, or any other evidence regarding the Department of Labor's actions towards other carbon plants, were never allowed into evidence, and were never subject to questions and cross-examination at the administrative hearing.

The Commission upheld the ALJ's exclusion of all evidence concerning other carbon plants, on the basis

that evidence concerning other plants was "not relevant to the judge's consideration of whether Shamokin's Carbon Plant is subject to Mine Act jurisdiction." 34 FMSHRC 1907 (Appx. F at 82a).

In contrast to the ALJ and the Commission, the Court of Appeals stated that inconsistent application of the statute may be relevant to whether the Department of Labor's decision regarding Shamokin should be upheld. _ F.3d _, 2014 WL 5801611, *7 (3d.Cir. 2014) (citing *Westar Energy v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1243 (D.C. Cir. 2007) ("The Order under review is arbitrary and capricious in that it provides no basis in fact or in logic for the Commission's refusal to treat Westar as it had treated KCPL."). However, the Third Circuit declined to remand the case to allow consideration of the evidence on the issue.

In *Florida Power & Light Company v. Nuclear Regulatory Commission,* 470 U.S. 729, 744 (1985), and other cases, this Court has said that the proper remedy in cases where the administrative agency failed to consider a relevant issue is to remand the case to the agency. "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.*, 470 U.S. at 744; *see also Gonzales v. Thomas*, 547 U.S. 183,

186 (2006) (granting summary reversal where "ordinary remand rule" was not followed); *INS v. Ventura*, 537 U.S. 12, 16–17 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

As in *Ventura*, the matter involved here (the similarity or dissimilarity of carbon plants that received different treatment by the Department of Labor) involves analysis of factors on which the Commission should make an initial determination. *See Ventura*, 537 U.S. at 16–17 ("The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.").

Rather than remanding the case to allow evidence on whether the Department of Labor's application of the statute was inconsistent and arbitrary, the Court of Appeals simply rejected Shamokin's argument after giving *de novo* consideration to one piece of the evidence that had been excluded from the record by the ALJ's order. The Court of Appeals referred to a June 22, 2004 Department of Labor memorandum ("2004 memorandum") that described the reasons that the Department of Labor gave for transferring jurisdiction of another carbon plant, Keystone Filler & Mfg., from MSHA to OSHA, which concluded that Keystone Filler's carbon plant was engaged in "manufacturing." The Court of Appeals stated that the memorandum's conclusion meant that the evidence was not relevant to Shamokin, but it ignored the rest of the memorandum that described the factors leading to the

Department of Labor's conclusion, factors that appear to apply equally to Shamokin. The 2004 memorandum was not allowed into evidence at the hearing, and so the bases for the Department of Labor's conclusion cited by the Court of Appeals, that Keystone Filler's carbon plant was "manufacturing" carbon products (but that Shamokin is "mining" while engaged in similar operations), were never examined. Moreover, the 2004 memorandum was just one component of the total evidence on inconsistent treatment that was excluded by the ALJ.

In summary, rather than considering the case on an incomplete hearing record, both as to the issue of inconsistent application of the statute and the 2004 memorandum which the Court of Appeals considered but without the benefit of a hearing record on it, the "ordinary remand rule" should be applied. *Ventura*, 537 U.S. at 18.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUR PETITION FOR PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED SEPTEMBER 8, 2014

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4457

SHAMOKIN FILLER COMPANY, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents.

On Petition for Review from the Federal Mine Safety and Health Review Commission
(Docket Nos. PENN 2009-775, -825, PENN 2010-63, -191, -275, -291, -381, -465, -515, -745, PENN 2011-16, -104, -129, -189)

SUR PETITION FOR PANEL REHEARING

Present: McKEE, *Chief Judge*, FUENTES, and CHAGARES, *Circuit Judges.*

The petition for rehearing filed by Shamokin Filler Company, in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

Dated: September 8, 2014

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 11, 2014

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4457

SHAMOKIN FILLER COMPANY, INC.,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),

Respondents,

On Petition for Review from the Federal Mine Safety and Health Review Commission.
(Docket Nos. PENN 2009-775, -825, PENN 2010-63, -191, -275, -291, -381, -465, -515, -745, PENN 2011-16, -104, - 129, -189)

December 10, 2013, Argued
July 11, 2014, Opinion Filed

Before: MCKEE, *Chief Judge*, FUENTES and CHAGARES, *Circuit Judges*.

Appendix B

OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Petitioner Shamokin Filler Company, Inc., operates a coal preparation facility in Shamokin, Pennsylvania that has been regulated by the Federal Mine Safety and Health Administration ("MSHA") since 1977. After a change in ownership in 2009, the new owners challenged MSHA's jurisdiction over the Shamokin facility, contending that the Occupational Safety and Health Administration ("OSHA"), not MSHA, should oversee it.[1] The Secretary of Labor, along with an Administrative Law Judge for the Federal Mine Safety and Health Review Commission, and the same Commission's appellate body, all disagreed and concluded that because Shamokin was engaged in the "work of preparing the coal," as defined in the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 802(i), MSHA's assertion of jurisdiction was proper. Shamokin petitions for review of the Commission's final order, arguing that its plant does not engage in the "work of preparing the coal" because it makes its 100% coal products out of already processed coal.

Shamokin's interpretation of the statute lacks any basis in the text of the Mine Act, and we decline to adopt

1. Presumably the new owners desired to avoid the more stringent requirements imposed by MSHA regulations and the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* As discussed in more detail below, MSHA, rather than OSHA, has much stricter oversight requirements including regarding respirable coal dust standards.

it. Shamokin also requests reversal of an evidentiary determination excluding evidence of MSHA's non-jurisdiction over other plants. We find this evidentiary challenge to be without merit. For the reasons that follow, we will deny the petition for review.

I. BACKGROUND[2]

A. Legal and Administrative Framework

The U.S. Department of Labor oversees, in relevant part, two agencies devoted to workplace safety and worker health: OSHA and MSHA. OSHA administers the Occupational Health and Safety Act of 1970 (the "OSH Act") and regulates workplace safety and worker health unless Congress has conferred jurisdiction on another agency in an industry-specific statute. *See* 29 U.S.C.

2. We have jurisdiction over this appeal under 30 U.S.C. § 816(a). The Administrative Law Judge's ("ALJ") final decision and order, entered on October 18, 2012, was not directed for review by the Mine Commission and by law became a final order of the Mine Commission on November 26, 2012. We review the Mine Commission's legal conclusions *de novo. See Reich v. D.M. Sabia Co.*, 90 F.3d 854, 860 (3d Cir. 1996). We review evidentiary rulings for abuse of discretion. *See Mach Min., LLC v. Sec'y of Labor, Mine Safety & Health Admin.*, 728 F.3d 643, 659 (7th Cir. 2013); *cf. Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (reviewing evidentiary decisions of an ALJ of the Department of Labor's Benefits Review Board under an abuse of discretion standard); *R & B Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.*, 618 F.3d 37, 44 (1st Cir. 2010) (same as to decisions of an ALJ of the Department of Labor's Administrative Review Board).

§ 653(b)(1). In this case, OSHA and the OSH Act govern Shamokin's plant unless MSHA, administering the Mine Act, governs instead.

The difference in jurisdiction results in a difference in oversight. MSHA's regulatory framework is more specific and extensive than OSHA's in regulating safety and health hazards associated with the handling of coal, particularly with regard to workers' exposure to respirable coal dust. *Compare* 30 C.F.R. Part 71 *with* 29 C.F.R. Part 1910, Subpart Z. Because of the dangers inherent in mining, Congress also gave the Secretary more rigorous enforcement mechanisms under the Mine Act than under the OSH Act. For example, the Mine Act, unlike the OSH Act, requires two inspections per year for surface mines, permits inspections to be conducted without a warrant, and in specified circumstances authorizes inspectors to issue orders requiring withdrawal of miners from the mine. *See* 30 U.S.C. §§ 813(a), 814(d), 814(e), 817(a); *Donovan v. Dewey*, 452 U.S. 594, 606, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981); *RNS Servs., Inc. v. Sec'y of Labor, Mine Safety & Health Admin. (MSHA)*, 115 F.3d 182, 187 (3d Cir. 1997).

In order to determine whether MSHA and the Mine Act govern, we must decide whether the facility to be regulated is a "coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce." 30 U.S.C. § 803; *see RNS Servs., Inc.*, 115 F.3d at 183. In relevant part, a "coal or other mine" under the Mine Act includes "lands, . . . facilities, equipment, machines, tools, or other property, . . . used in, or to be

used in, . . . the work of preparing coal . . . and includes custom coal preparation facilities." 30 U.S.C. § 802(h)(1)-(h)(2). We have found this provision to be "so expansively worded as to indicate an intention on the part of Congress to authorize the Secretary to assert jurisdiction over any lands *integral* to the process of preparing coal for its ultimate consumer." *RNS Servs., Inc.*, 115 F.3d at 186 (emphasis added). The Mine Act defines "the work of preparing the coal" as "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).

We employ a "functional analysis" in assessing whether MSHA has jurisdiction, under which we give the "broadest possible scope to [M]ine Act coverage." *Pa. Elec. Co. v. Fed. Mine Safety & Health Review Comm'n ("Penelec")*, 969 F.2d 1501, 1503 (3d Cir. 1992) (quotation marks omitted). What matters most is how the company uses the coal:

> Turning to the case law, in [*Penelec*], we held that "the delivery of raw coal to a coal processing facility is an activity within the Mine Act, but not the delivery of completely processed coal to the ultimate consumer." 969 F.2d 1501 [at 1504] (citing *Stroh v. Director, Office of Workers' Comp. Progs.*, 810 F.2d 61, 64 (3d Cir. 1987)). *See also Hanna v. Director, Office of Workers' Comp. Progs.*, 860 F.2d 88, 92-93 (3d Cir.1988). In *Stroh*, we found that "shovel[ing coal] into [a]

> truck, and haul[ing] it to independently owned coal processing plants" was integral to the work of preparing the coal. [810 F.2d] at 62. We further noted that the loaded coal's subsequent transportation over public roads did not alter its status as an activity that is part of the work of preparing the coal. *Id*. at 65.
>
> *Penelec* applied a functional analysis, wherein the propriety of Mine Act jurisdiction is determined by the nature of the functions that occur at a site. That analysis has its roots in *Wisor v. Director, Office of Workers' Comp. Progs*., 748 F.2d 176, 178 (3d Cir.1984), was applied in *Stroh*, 810 F.2d at 64, and has been adopted by the Fourth Circuit. *See United Energy Servs., Inc. v. Federal Mine Safety & Health Admin*., 35 F.3d 971, 975 (4th Cir. 1994).

RNS Servs. Inc., 115 F.3d at 184.

B. Procedural History

Between 1977 and 2009, MSHA treated Shamokin's facility, operated by another owner, as a mine and inspected it for compliance with the Mine Act. In 2009, Shamokin changed ownership. The current owners (children of the former owners) wrote to the Secretary of Labor requesting that MSHA relinquish jurisdiction over the plant. The Secretary refused. Between 2009 and 2011, the Secretary, through MSHA, issued a number of citations against Shamokin for violations of the Mine

Act that MSHA inspectors found at Shamokin's plant. Among the most serious of these citations were numerous violations of MSHA's respirable dust standards.

Shamokin contested the citations in front of an ALJ of the Federal Mine Safety and Health Review Commission. Shamokin stipulated that it was liable for the violations and associated penalties to the extent that MSHA appropriately exercised jurisdiction over the plant. However, Shamokin objected to MSHA's jurisdiction, on the grounds that it was not operating a "coal or other mine," but instead was mainly engaged in the manufacture of products made out of coal rather than the preparation of anthracite coal. After an ALJ found that MSHA had jurisdiction, Shamokin appealed to the Mine Commission's appellate body, which affirmed the ALJ.

C. Factual Findings of the Mine Commission

The facts as found by the Mine Commission are conclusive as Shamokin mounts no argument to show that they are not supported by substantial evidence. *See* 30 U.S.C. § 816(a). The ALJ specifically found that, "the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use." App. at A25. The ALJ also determined Shamokin's key witness "offered contradictory, inconsistent, and suspect testimony." *Id*. Specifically, there was "an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal

operations." *Id*. The ALJ determined that Shamokin's assertion that it was principally engaged in manufacturing coal products, rather than coal processing, was belied by the evidence: "over 6,000 tons of [Shamokin's] product, 'carb-o-cite,' made of 100% anthracite coal, was sold in 2009, as compared to only a few tons of multiple products containing no coal or coal mixtures. . . . This Court noted that neither inspector . . . observed any mixing of coal with non-coal materials at the plant." *Id*. at A26. The ALJ concluded that "[Shamokin] is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce." *Id*. at A28. The Mine Commission's appellate body affirmed the ALJ's decision as supported by "substantial evidence." *Id*. at A36.

D. Conclusions of Law of the Mine Commission

The ALJ determined that "[t]he fact that [Shamokin] is customizing the formulas to meet industry and customer specifications only strengthens the Secretary's position that [Shamokin] is operating a custom coal preparation facility and should, therefore, continue to be covered under MSHA's jurisdiction." *Id*. at A28. The Mine Commission affirmed, concluding that that the ALJ "was correct in concluding that the Carbon Plant performs the 'work of preparing the coal,' and thus is a 'mine' . . . subject to jurisdiction under the Mine Act." *Id*. at A38.

E. Evidentiary Ruling

The ALJ granted the Secretary's motion seeking to exclude evidence gathered by a 2004 MSHA fact-finding committee that had reviewed operations at seven facilities that Shamokin claimed were similar to its carbon plant. The ALJ first found that the evidence of MSHA's oversight over other facilities was irrelevant because MSHA jurisdiction should be determined on a "case-by-case basis." *Id.* at A2. It also found that, even if it were relevant, it should be excluded because "its probative value [was] . . . substantially outweighed by a danger of unfair prejudice, confusion of the issues, or . . . a waste of time or needless presentation of cumulative evidence." *Id.* (relying on 29 C.F.R. § 2700.63(a), which provides, "relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible," and Federal Rule of Evidence 403). The ALJ reasoned that the balance in this case weighed in favor of exclusion given the case-by-case nature of the inquiry over whether MSHA jurisdiction is proper; the fact that it would be "cumbersome and impractical" to review "whether and why MSHA has exercised or should exercise jurisdiction over similar 'bagging facilities'"; and that Shamokin would be not be prejudiced given the otherwise wide breadth of the evidentiary hearing. App. at A2-3.

The ALJ revisited the evidentiary determination after the hearing itself, adding that there was no appellate case law on the question of whether "a comparative facility analysis approach" was proper. *Id.* at A9. Accordingly, the ALJ found that the approach Shamokin requested would

detract from analysis of the particular facility at issue, sending the tribunal on a "jurisdictional safari, searching out all similar facilities in the country and comparing alike and non-alike activities, structures, operations, and products with that of the subject Carbon Plant. [] The collateral inquiries would be endless." *Id.* at A10.

The Mine Commission's appellate body affirmed under an abuse of discretion standard, adding that Administrative Procedure Act § 556(d) imposes an obligation on the agency to have a policy to exclude "irrelevant, immaterial, or unduly repetitious evidence." *Id.* at A39 (citing 5 U.S.C. § 556(d)). The Mine Commission agreed that the evidence was not relevant because "[i]t is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction," and jurisdiction is "governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct." App. at A39 (internal quotation marks and citations omitted). Moreover, given that the evidence was of "limited probative value," its introduction would have "unduly delayed the trial"—Shamokin would have had to present "a significant number of additional witnesses" to "demonstrate the similarities between those facilities and its Carbon Plant." *Id.* at A40. Finally, the appellate body noted that MSHA has asserted jurisdiction over Shamokin's plant for decades, and that there has been no change in Shamokin's operations. *Id.*

II. DISCUSSION

A. 30 U.S.C. § 802: "work of preparing the coal"

Under our functional analysis, Shomakin is engaged in "the work of preparing the coal." In *RNS*, the loading of coal for transport to another facility for further processing was considered "the work of preparing the coal," because the "storage and loading of the coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities." 115 F.3d at 185. Shamokin does more than the facility in *RNS*: Shamokin admits that it stores, dries, screens, and bags coal. Under *RNS*, it is subject to MSHA jurisdiction.

Shamokin nonetheless argues that it is not engaged in the work of preparing coal under the Mine Act definition because it purchases coal that has already been processed. Shamokin supports its argument in four ways worth addressing: first, through statutory interpretation, second, through relying on a definition of "coal preparation" from the now defunct U.S. Bureau of Mines, third, by arguing that the statute would lack meaningful boundaries without its proposed limitation, and finally, by relying on case law from various Courts of Appeals. Each argument will be addressed in turn.

Shamokin first makes a statutory argument. It contends that the last phrase in § 802(i), "and such other work of preparing such coal as is usually done by the operator of the coal mine," modifies the earlier items in

the list such that only functions that are usually done by the "operator of *a* coal mine" are regulated under the Mine Act. Petitioner's Br. at 13 (emphasis added). In turn, only processing of "raw," "run-ofmill" or unprepared coal, not the processing of coal that is already in "usable or marketable condition," would usually be done by an operator of a coal mine. *Id*. The Secretary responds that the Mine Act contains no such limitation.

We believe the Secretary is correct. The words "raw" or "unprepared" or "run-of-mill" never appear anywhere in the Mine Act definitions, a strong indication that Congress never restricted Mine Act coverage to those facilities that begin with coal in these states. Additionally, in *RNS*, we addressed the last phrase in § 802(i), and rejected the predicate of the argument that Shamokin raises here—whether the activities at the plant are usually done by the operator of *a hypothetical* coal mine is not relevant in the analysis. In *RNS*, we placed emphasis on the definite article in the phrase "as is usually done by the operator of *the* coal mine." 115 F.3d at 185 (emphasis added) (internal quotation marks omitted). We decided that if 802(i) had an indefinite article in place of the definite article, reading instead "the operator of *a* coal mine," this clause could imply that "one might have to compare the activities at the alleged coal mine with those of a typical, paradigmatic, 'usual' coal mine." *RNS Servs. Inc*., 115 F.3d at 185. However, the sentence as written differs. It "simply explains that the work of the coal mine is the work that is usually done in that particular place. The fact that [a] [s]ite is perhaps an unconventional coal mine does not defeat its status as a coal mine for the purposes of [§] 802." *Id*. Shamokin's statutory argument is therefore without merit.

Shamokin's second argument borrows from the *Dictionary of Mining, Mineral and Related Terms* published by the U.S. Bureau of Mines, a now defunct federal agency that conducted scientific research on the extraction, processing, use, and conservation of mineral resources until its closure in 1995. The Bureau had defined "coal preparation" as "[t]he various physical and mechanical processes in which *raw* coal is dedusted, graded, and treated by dry methods (rarely) or water methods, using dense-media separation (sink-float), jigs, tables, and flotation. The objective is the removal of free dirt, sulfur, and other undesirable constituents."[3] This definition is at least eighteen years old and is from an agency that was tasked not with safety but rather research. In any event, the words "raw coal" do not appear in the Mine Act, and Shamokin has failed to show why this definition should take precedence over the one in the Mine Act.

Third, Shamokin asserts that unless the work of preparing coal ends "when the raw, run-of-mill extracted material has been processed into a usable condition," the list of activities enumerated in § 802(i) would be unworkably broad. Petitioner's Br. at 14. Such an interpretation, the argument runs, could include "anyone who handles coal, no matter how far down the stream of commerce," subsuming non-mining activities such as operations "that use processed coal for heating, powering equipment, as a feedstock in producing other

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3. *Available at* http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/ (last accessed June 30, 2014) (emphasis added).

products, or which merely transport the processed coal." *Id*. at 14-15. But this Court's functional approach has already managed to weed out such activities. For example, without Shamokin's proposed limitation, we determined that delivery of raw coal to a processing facility, but not delivery of processed coal to the consumer, counts as the work of preparing the coal. *See RNS Servs., Inc*., 115 F.3d at 184. In *RNS*, the loading of coal for transport to another facility for further processing was considered "the work of preparing the coal" because the "storage and loading of the coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities." *Id*. at 185. Thus, through the rubric of the functional test, activities that are too far attenuated from the actual processing of coal, and which are not "critical" or "integral," *see id*. at 185-86, in preparation of receipt by the end user, will not be subsumed under the Mine Act definition and in fact have not been.

Contrary to Shamokin's assertion, our opinion in *Dowd v. Director, Office of Workers' Compensation Programs*, 846 F.2d 193, 194-195 (3d Cir. 1988) does not counsel in favor of another result.[4] In *Dowd*, we determined that

4. *Dowd* is of limited import here because it was decided under Title IV of the Mine Act, or the Black Lung Benefits Act of 1972 ("BLBA"), 30 U.S.C. § 901 *et seq*., for which Congress has specified that a different definition of coal mine applies. *Compare* 30 U.S.C. § 802(h)(2) (defining "coal mine" for purposes, among others, of subchapter IV of chapter 22, which includes the BLBA), *with* 30 U.S.C. § 802(h)(1) (defining "coal or other mine" for the rest of chapter 22, which includes the Mine Act).

a worker was involved in the preparation of coal at a "custom coal preparation facility" because his employer dried and crushed "unprepared anthracite [coal]." *Id*. at 195. Shamokin asks us to extrapolate from this that the work of further preparing prepared coal would thus not be considered coal preparation. In so doing, it requests that we convert a sufficient condition into a necessary one, but nothing about the opinion implies that the facilities have to *begin* with unprepared anthracite to be "custom coal preparation facilities."

Finally, Shamokin attempts to demonstrate that courts routinely cut off Mine Act jurisdiction at the point where raw coal becomes usable. Having reviewed the cases cited, we agree with the Secretary that none of these cases stands for the proposition that the Mine Act does not cover the further processing of already processed coal.[5]

5. See Petitioner's Br. at 16-18 (citing *Southard v. Dir., OWCP*, 732 F.2d 66, 68-70 (6th Cir. 1984) (finding under the BLBA that a worker who stored, loaded, and unloaded coal for a coal retailer was not engaged in the "work of preparing the coal" because the coal retailers he worked for were "purchasers of prepared coal"); *Eplion v. Dir., OWCP*, 794 F.2d 935, 937 (4th Cir. 1986) (finding under the BLBA that a worker who transported and distributed processed coal was not engaged in the "work of preparing the coal" because the coal was "already processed and prepared for market before [the worker] had any contact with it"); *Collins v. Dir., OWCP*, 795 F.2d 368, 372 (4th Cir. 1986) (finding under the BLBA that a truck driver who hauled slate (coal refuse) from the "tipple" at the end of processing was not engaged in coal mine employment)). In fact, we have before *declined* to impose a bright line rule that preparation ends "at the point when the coal is placed into the processing tipple because we are not convinced

It is also worth noting that Shamokin's most serious mine safety citations involved violations of MSHA's respirable dust standards. Given that the activities at Shamokin's plant trigger the types of safety concerns that the Mine Act was intended to remedy, it would defy Congress's intent to allow Shamokin to escape Mine Act jurisdiction based on a formality. *See RNS Servs., Inc.*, 115 F.3d at 187 (noting that the Mine Commission had "legitimate concerns about worker safety and health at the Site," which included "[t]rue potential hazards" such as "circulation of dust").

Thus, we decline Shamokin's invitation to impose additional limitations not in the statute and find that MSHA's assertion of jurisdiction over the plant was proper.

B. Evidentiary Appeal

Shamokin also challenges the ALJ's decision to exclude evidence of MSHA's non-assertion of jurisdiction over plants that Shamokin claims are its competitors. Shamokin contends that the evidence would have showed an inconsistent position regarding MSHA's exercise of jurisdiction over carbon products plants such as

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that each step essential to the preparation of the coal for entry into the stream of commerce is completed at that point. Thus, [the employer's] participation in the removal of the coal from the tipple was a step, if only the very last step, in the preparation of the coal." *Hanna v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 860 F.2d 88, 93 (3d Cir. 1988) (looking with skepticism on *Collins*, 795 F.2d at 372, relied on by Shamokin).

Shamokin's, which could call into question the propriety of the Secretary's assertion of jurisdiction here.

Shamokin submits that a number of memoranda are relevant to the question of whether MSHA has consistently interpreted the statute to allow for jurisdiction over the further processing of non-raw coal. In its brief, Shamokin discusses only the operations of the Keystone Filler & Manufacturing plant, highlighting a June 22, 2004 memorandum as representative, so that is the plant and memorandum we will address. According to this memorandum, written by Counsel for Standards, Mine Safety and Health, to a District Manager of MSHA, Keystone's facility was not engaged in the "work of preparing the coal" because,

> once the coal arrives at this facility, it is already fully prepared and ready to be used by Keystone as a chemical compound ingredient in the manufacture of saleable products for the rubber, plastics, and steel products industries. . . . Other ingredients are added to it such as coke, petroleum laced coke and graphite. Any oversized pieces are crushed at Keystone, but this crushing is incidental to the manufacturing process. As a consumer of fully processed coal sold in the open market, Keystone's work constitutes manufacturing rather than mining, and as such, not subject to MSHA jurisdiction. . . . [P]reparation ends when the coal is ready for use.

App. at A184.

We agree that the consistency of an agency's application of a statute might be relevant. *See, e.g., Westar Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 473 F.3d 1239, 1243, 374 U.S. App. D.C. 256 (D.C. Cir. 2007) ("The Order under review is arbitrary and capricious in that it provides no basis in fact or in logic for the Commission's refusal to treat Westar as it had treated KCPL."). However, this memorandum is not relevant. Keystone was engaged in manufacturing, not coal processing. Shamokin argued unsuccessfully to the Mine Commission that it, like Keystone, was mainly engaged in the manufacture of carbon-based products for the steel, rubber, and plastics industries. The Mine Commission determined this assertion was factually without merit, as inspectors found no mixing of coal with non-coal materials at the plant, and the records supplied by Shamokin confirmed that it sold only a few tons of products containing no coal or coal mixtures. As such, Shamokin's comparison to Keystone is not apt, as Shamokin was mainly engaged in coal processing, not manufacturing of other products using coal.

Furthermore, as the Mine Commission pointed out, better evidence on the consistency of MSHA's jurisdictional decisions is the fact that the Secretary through MSHA has asserted jurisdiction over Shamokin from 1977 to 2009 without a change in its operations when the new owners assumed the helm. Indeed, this demonstrates that the Secretary has *consistently* interpreted the statute. We also agree with the ALJ's assessment that the introduction of this evidence could have opened up a stream of requests for comparisons to

facilities all around the country, causing an unnecessary delay in the proceedings to address collateral matters.

Given the limited probative value of the evidence, and the potential it had to unnecessarily delay the hearing, we affirm the Mine Commission's decision to exclude the evidence of MSHA's non-assertion of jurisdiction over other facilities. We find that the agency's decision was not an abuse of discretion. *Cf. Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 187 (3d Cir. 1990); *see also United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

III. CONCLUSION

For the foregoing reasons, we will deny the Petition for Review of the Mine Commission's final order. The Secretary's exercise of jurisdiction over Shamokin through MSHA was proper. Furthermore, the ALJ did not commit an abuse of discretion by failing to allow into evidence internal memoranda between MSHA employees regarding the non-assertion of jurisdiction over other facilities.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 11, 2014

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-4457

SHAMOKIN FILLER COMPANY, INC.,

Petitioner

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

Respondents

On Petition for Review from the Federal Mine Safety and Health Review Commission (Docket Nos. PENN 2009-775, -825, PENN 2010-63, -191, -275, -291, -381, -465, -515, -745, PENN 2011-16, -104, -129, -189)

Argued: December 10, 2013

Before: MCKEE, *Chief Judge,* FUENTES and CHAGARES, *Circuit Judges.*

Appendix C

JUDGMENT

This cause came to be heard on Petition from an Order of the Federal Mine Safety and Health Review Commission and was argued on December 9, 2013.

After consideration of all the contentions raised, it is ADJUDGED and ORDERED that the Petition for Review is DENIED. All in accordance with the Opinion of the Court.

ATTEST:

s/Marcia M. Waldron
Clerk

Date: July 11, 2014

APPENDIX D — NOTICE OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, DATED NOVEMBER 8, 2012

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

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

v.

SHAMOKIN FILLER COMPANY, INC.

(Docket Nos. PENN 2009-775, -825, PENN 2010-63, -191, -275, -291, -381, -465, -515, -745, PENN 2011-16, -104, -129, -189)

NOTICE

A petition for discretionary review was filed by Shamokin Filler Company, Inc. with the Federal Mine Safety and Health Review Commission on October 23, 2012 under section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). However, no two Commissioners voted to grant the petition or to otherwise order review under 30 U.S.C. § 823(d)(2)(B). Consequently, the decision of Administrative Law Judge

John Kent Lewis dated October 17, 2012 is final as of 40 days after its issuance. 30 U.S.C. § 823(d)(1).

/s/__________________
Jean H. Ellen
Chief Docket Clerk

APPENDIX E — FINAL DECISION AND ORDER OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, DATED OCTOBER 17, 2012

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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875 GREENTREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
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SHAMOKIN FILLER COMPANY, INC.,

Contestant,

v.

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

Respondent.

SHAMOKIN FILLER COMPANY, INC.,

Contestant,

v.

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

Respondent.

Appendix E

SHAMOKIN FILLER COMPANY, INC.,

Contestant,

v.

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

Respondent.

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

Petitioner,

v.

SHAMOKIN FILLER COMPANY, INC.,

Respondent.

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

Petitioner,

v.

SHAMOKIN FILLER COMPANY, INC.,

Respondent.

Appendix E

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

Petitioner,

WILLIAM ROSINI, employed by SHAMOKIN FILLER COMPANY, INC.,

Respondent.

CONTEST PROCEEDINGS

Docket No. PENN 2009-736-R
Citation No. 7011691; 08/12/09

Docket No. PENN 2009-737-R
Citation No. 7011692; 08/12/09

Docket No. PENN 2009-738-R
Citation No. 7011693; 08/13/09

Docket No. PENN 2009-739-R
Citation No. 7010952; 08/20/09

Docket No. PENN 2009-740-R
Citation No. 7011695; 08/25/09

Docket No. PENN 2009-741-R
Citation No. 7011696; 08/25/09

Docket No. PENN 2009-742-R
Citation No. 7011697; 08/25/09

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Docket No. PENN 2009-763-R
Citation No. 7011699; 08/27/09

Docket No. PENN 2009-776-R
Citation No. 7011700; 08/31/09

Docket No. PENN 2009-777-R
Citation No. 7011781; 08/12/09

Docket No. PENN 2009-778-R
Citation No. 7011782; 08/31/09

Docket No. PENN 2009-779-R
Citation No. 7011783; 08/31/09

Docket No. PENN 2009-780-R
Citation No. 7011784; 09/01/09

Docket No. PENN 2010-59-R
Order No. 7011795; 10/21/09

Docket No. PENN 2010-60-R
Order No. 7011796; 10/21/09

Docket No. PENN 2010-146-RM
Citation No. 7009795; 11/17/09

Docket No. PENN 2010-147-RM
Citation No. 7009796; 11/17/09

Docket No. PENN 2010-354-R
Citation No. 7000087; 03/04/10

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Docket No. PENN 2010-377-R
Citation No. 7012104; 03/08/10

Docket No. PENN 2010-387-R
Citation No. 7012105; 03/09/10

Docket No. PENN 2010-577-R
Citation No. 7012685; 06/21/10

Docket No. PENN 2010-589-R
Citation No. 7012687; 06/23/10

Docket No. PENN 2010-650-R
Citation No. 7012120; 07/15/10

Docket No. PENN 2010-651-R
Citation No. 7012441; 07/15/10

Docket No. PENN 2010-652-R
Citation No. 7012442; 07/15/10

Docket No. PENN 2010-653-R
Citation No. 7012443; 07/15/10

Docket No. PENN 2010-654-R
Citation No. 7012669; 07/15/10

Docket No. PENN 2010-655-R
Citation No. 7012670; 07/15/10

Docket No. PENN 2010-656-R
Citation No. 7012671; 07/15/10

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Docket No. PENN 2010-657-R
Citation No. 7012672; 07/15/10

Docket No. PENN 2010-658-R
Citation No. 7012673; 07/16/10

Docket No. PENN 2010-669-R
Citation No. 7012674; 07/16/10

Mine ID: 36-02945
Mine: Carbon Plant

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2009-825
A.C. No. 36-02945-197364

Docket No. PENN 2009-775
A.C. No. 36-02945-194224

Docket No. PENN 2010-63
A.C. No. 36-02945-200482

Docket No. PENN 2010-191
A.C. No. 36-02945-206331

Docket No. PENN 2010-275-M
A.C. No. 36-02945-208680

Docket No. PENN 2010-291
A.C. No. 36-02945-209018

Docket No. PENN 2010-381
A.C. No. 36-02945-213119

Docket No. PENN 2010-465
A.C. No. 36-02945-216876

Docket No. PENN 2010-515
A.C. No. 36-02945-219682

Docket No. PENN 2010-745
A.C. No. 36-02945-229176

Docket No. PENN 2011-16
A.C. No. 36-02945-232342

Docket No. PENN 2011-104
A.C. No. 36-02945-238543

Docket No. PENN 2011-189
A.C. No. 36-02945-244057

Mine: Carbon Plant

CIVIL PENALTY PROCEEDING

Docket No. PENN 2011-129
A.C. No. 36-02945-241465-A

Mine: Carbon Plant

Appendix E

FINAL DECISION AND ORDER

Before: Judge Lewis

Pursuant to the Parties' Joint Motion for Final Decision in the above captioned matter, the undersigned Administrative Law Judge hereby enters the following Final Decision and Order.

Respondent has requested a hearing on the citations, orders and associated civil penalties contained in these dockets in accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.50 *et seq.* Respondent's central objection to the citations is that the Mine Safety and Health Administration ("MSHA") lacks jurisdiction over Respondent's Carbon Plant in Shamokin, Pennsylvania.

On October 27 and 28, 2010, the undersigned held an evidentiary hearing limited to the issue of jurisdiction and concluded that MSHA has jurisdiction over the Carbon Plant. The undersigned also granted the Secretary's motion *in limine* and denied Respondent's motion to compel evidence related to other facilities that Respondent claimed were similar to its Carbon Plant and that is asserted MSHA and the Solicitor's Office had determined were not mines subject to regulation under tbe Mine Act.

Respondent filed an interlocutory appeal with the Commission urging the Commission to reverse the jurisdictional and evidentiary determinations, and the

Commission granted interlocutory review. On August 28, 2012, the Commission affirmed the jurisdictional and evidentiary rulings and remanded the case for a hearing in accordance with its decision.

On remand, the parties agree that the remaining issues related to each citation can be addressed through stipulations. The stipulations allow for a final agency order to be issued so that Respondent can seek judicial review of the Commission's interlocutory decision in the Court of Appeals.

I have reviewed the stipulations and explanations of the parties and agree that the modifications and proposed penalties contained in the stipulations are an appropriate basis for issuing a final decision in these cases. Pending judicial review of the Commission's determination that MSHA has jurisdiction over Respondent's Carbon Plant, the gravity, negligence and penalty amounts of the following citations are stipulated to by the parties as follows:

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PENN 2009-775

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/ Rationale
7011370 104(a) § 71.208(a)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
1 Citation, $100.00 as initially issued				**1 Citation, $100.00**

PENN 2009-825

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011691 104(a) § 77.204	S&S, Reasonably Likely, Permanently Disabling	Moderate	$946.00	Remains as issued, penalty reduced to $760.00 *Respondent offered evidence that the location of the cited starter box was such that the miners were infrequently in the area where the box was located, thus reducing the likelihood of injury.

7011692 104(a) § 77.1103(d)	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$127.00	Modify to low negligence, penalty reduced to $100.00 *Respondent offered evidence that the weeks, grass and underbrush surrounding the gasoline storage tank and nature gas service line were not significantly overgrown, thus reducing its negligence in failing to keep the cited area free of weeds, grass and underbrush.
7011693 104(a) § 77.1605(b)	Non-S&S, Unlikely, Lost Workdays	Moderate	$127.00	Remains as issued and assessed
3 Citations, $1,200.00 as initially issued.				**3 Citations, $987.00, as modified**

PENN 2010-63

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7001013 104(a) § 77.505	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
7001014 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Remains as issued and assessed
7001015 104(a) § 77.516	Non-S&S, Unlikely, No Lost Workdays	Moderate	$334.00	Modify to low negligence, penalty reduced to $154.00 *Respondent offered evidence that the conduit which was cited for not being in the breaker box had fallen out after the last electrical examination, thus reducing its negligence.

7001016 104(a) § 77.502	Non-S&S, Unlikely, No Lost Workdays	Moderate	$392.00	Remains as issued and assessed.
7001017 104(a) § 77.701	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Low	$100.00	Remains as issued and assessed.
7001018 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Modify to low negligence, penalty reduced to $270.00 *Respondent offered evidence that the exposed leads in the cited plug were not exposed at the time of the last electrical examination, thus reducing its negligence.

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7001019 104(a) § 77.505	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$127.00	Remains as issued and assessed.
7001020 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$585.00	Modify to low negligence, penalty reduced to $270.00 *Respondent offered evidence that the cited cord was not damaged at the time of the last electrical examination, thus reducing its negligence.
7011981 104(a) § 77.516	Non-S&S, Unlikely, No Lost Workdays	Moderate	$334.00	Remains as issued, penalty reduced to $234.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the cited opening was only 3/4" in size.

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7010952 104(A) § 77.208(a)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$308.00	Remains as issued, penalty reduced to $262.00 *This reduction is warranted on the grounds that the dust sample was invalid for failure to properly complete the sampling process not for exceeding the respirable dust exposure limits
7011695 104(a) § 77.205(a)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$634.00	Remains as issued and assessed.
7011696 104(a) § 77.207	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$2,106.00	Remains as issued, penalty reduced to $1,791.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the poor lighting in the area was a recent development.

7011697 104(a) § 77.400(d)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$946.00	Remains as issued, penalty reduced to $757.00 * This reduction warranted on the grounds that the negligence was somewhat less than initially determined as there was no evidence that management personnel were in the area of the dryer at the time the gate was found open.
7011699 104(a) § 77.400(a)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$2,106.00	Remains as issued, penalty reduced to $1,700.00 *This reduction is warranted on the grounds that the negligence was somewhat less than initially determined as the unguarded screw conveyor had only been constructed one week prior to the inspection.

7011781 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$425.00	Remains as issued and assessed.
7011782 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays Restricted Duty	Moderate	$425.00	Remains as issued and assessed.
7011783 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$425.00	Modify to low negligence, penalty reduced to $212.00 *Respondent offered evidence that the cited light worked during the previous shift, thus reducing its negligence.
7011784 104(a) § 77.1713	Non-S&S, No Likelihood, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.

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PENN 2010-191

19 Citations, $12,723.00 as initially issued.				**19 Citations, $9,509.00, as modified.**

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7009791 104(a) § 41.12	Non-S&S, No Likelihood, No Lost Workdays	High	$100.00	Modify to moderate negligence, penalty remains as issued *Respondent offered evidence that since the day to day management of the Carbon Plant has not changed, it did not realize there was an obligation to notify MSHA in writing of the change in mine ownership.

<table>
<tr><td>7012003
104(a)
§ 77.207</td><td>S&S,
Reasonably
Likely, Lost
Workdays or
Restricted
Duty</td><td>Moderate</td><td>$224.00</td><td>Remains as issued and
assessed.</td></tr>
<tr><td>7009792
104(g)(1)
Order
§ 48.25(a)</td><td>S&S,
Reasonably
Likely, Fatal</td><td>High</td><td>$2,341.00</td><td>Modify to permanently
disabling, penalty reduced to
$1,052.00
*Respondent offered evidence
that the lack of new miner
training was more likely
to result in a permanently
disabling injury than a fatal
accident, thus reducing the
injury or illness reasonably
expected.</td></tr>
</table>

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7009793 104(g)(1) Order § 48.25(a)	S&S, Reasonably Likely, Fatal	High	$4,099	Modify to permanently disabling, penalty reduced to $1,842.00 *Respondent offered evidence that the lack of complete adequate training was more likely to result in a permanently disabling injury than a fatal accident, thus reducing the injury or illness reasonably expected.
7009794 104(a) § 48.24(b)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	High	$1,111.00	Remains as issued and assessed.
3 Citations and 2 Orders, $7,875.00, as initially issued				**3 Citations and 2 Orders, $4,329.00, as modified.**

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PENN 2010-275

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7009795 104(a) § 50.20(a)	Non-S&S, No Likelihood, No Lost Workdays	High	$100.00	Remains as issued and assessed.
7009796 104(a) § 50.20(a)	Non-S&S, No Likelihood, No Lost workdays	High	$100.00	Remains as issued and assessed.
2 Citations, $200.00, as initially issued.				**2 Citations, $200.00**

Appendix E

PENN 2010-291

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011792 104(d)(1) Citation § 71.202(a)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$16,867.00	Remains as issued, penalty reduced to $11,807 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
7011795 104(d)(1) Order § 71.205(b)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $9,731.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.

7011796 104(d)(1) Order § 71.205(c)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $9,371.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
7011797 104(d)(1) Order § 71.204(d)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$18,742.00	Remains as issued, penalty reduced to $12,930.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time period were within permissible limits.
1 Citation and 3 Orders, $73,093.00 as initially issued.				**1 Citation and 3 Orders, $43,479.00, as modified.**

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PENN 2010-381

Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011793 104(d)(1) Order § 71.209(c)	Non-S&S, No Likelihood, No Lost Workdays	Reckless Disregard	$2,200.00	Remains as issued and assessed.
7011794 104(d)(1) Order § 71.209(a)	Non-S&S, No Likelihood, No Lost Workdays	Reckless Disregard	$2,200.00	Remains as issued and assessed.
2 Orders, $4,400.00, as initially issued.				**2 Orders, $4,400.00.**

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PENN 2010-465

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7000081 104(a) § 71.100	S&S, Reasonably Likely, Permanently Disabling	Moderate	$207.00	Remains as issued and assessed.
7012104 104(a) § 77.400(a)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$190.00	Remains as issued and assessed.
7012105 104(a) § 77.502	Non-S&S, Unlikely, Fatal	Moderate	$190.00	Modify to low negligence, penalty reduced to $100.00 *Respondent will offer evidence that the damage junction box was in an isolated area reducing the likelihood that the damage would be observed and, therefore, reducing its negligence.

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3 Citations, $597.00, as initially issued				**3 Citations, $497.00, as modified**

PENN 2010-515

Citation No.	**Gravity**	**Negligence**	**Proposed Penalty**	**Penalty/Rationale**
7012106 104(a) § 77.310(b)	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
7012107 104(a) § 77.310(d)	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
2 Citations, $200.00, as initially issued.				**2 Citations, $200.00**

PENN 2010-745

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7012685 104(a) § 77.501-2	Non-S&S, Unlikely, No Lost Workdays	Moderate	$100.00	Remains as issued and assessed.
7012687 104(a) § 77.502	S&S, Reasonably Likely, Fatal	Moderate	$285.00	Remains as issued and assessed.
7012669 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
7012670 104(a) § 77.516	Non-S&S, Unlikely No Lost Workdays	Low	$100.00	Remains as issued and assessed.

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7012671 104(a) § 77.516	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
7012120 104(a) § 77.410(c)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$127.00	Modify to low negligence, penalty reduced to $100.00 *Respondent offered evidence that the forklift had just begun operating on the day it was cited, and the backup alarm worked when it was last operated, thus reducing its negligence.
7012441 104(a) § 77.1606(a)	S&S, Reasonably Likely, Permanently Disabling	Moderate	$127.00	Remains as issued and assessed.
7012442 104(a) § 77.505	Non-S&S, Unlikely, Fatal	Moderate	$100.00	Remains as issued and assessed.

7012443 104(a) § 77.502	Non-S&S, Unlikely, Fatal	Moderate	$100.00	Remains as issued and assessed
7012672 104(a) § 77.502	S&S, Reasonably Likely, Fatal	Moderate	$285.00	Remains as issued and assessed
7012673 104(a) § 77.207	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed
7012674 104(a) § 77.502	Non-S&S, Unlikely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
12 Citations, $1,624.00, as initially issued				**12 Citations, $1,597.00, as modified.**

PENN 2011-16

Citation No.	**Gravity**	**Negligence**	**Proposed Penalty**	**Penalty/Rationale**
7012445 104(a) § 77.400(a)	Non-S&S, Unlikely, Permanently Disabling	Moderate	$100.00	Remains as issued and assessed.
7012444 104(a) § 77.312	Non-S&S, Unlikely, Permanently Disabling	Moderate	$100.00	Remains as issued and assessed.
2 Citations, $200.00, as initially issued				**2 Citations, $200.00**

PENN 2011-104

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7007198 104(a) § 77.1605(d)	S&S, Reasonably Likely, Lost Workdays or Restricted Duty	Moderate	$100.00	Remains as issued and assessed.
1 Citation, $100.00, as initially issued.				**1 Citation, $100.00**

PENN 2011-189

Citation No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7007528 104(a) § 77.100	S&S, Reasonably Likely, Permanently Disabling	Moderate	$138.00	Remains as issued and assessed.
1 Citation, $138.00, as initially issued.				**1 Citation, $138.00**

Appendix E

PENN 2011-129, *Secretary v. William Rosini, employed by Shamokin Filler Company*

Citation/ Order No.	Gravity	Negligence	Proposed Penalty	Penalty/Rationale
7011792 104(d)(1) Citation § 71.202(a)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,100.00	Remains as issued, penalty reduced to $1,456.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.

7011795 104(d)(1) Order § 71.205(b)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,500.00	Remains as issued, penalty reduced to $1,036.00 *This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.
7011796 104(d)(1) Order § 71.205(c)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,300.00	Remains as issued, penalty reduced to $1,000.00 * This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.

7011797 104(d)(1) Order § 71.204(d)	S&S, Reasonably Likely, Permanently Disabling	Reckless Disregard	$3,500.00	Remains as issued, penalty reduced to $1,672.00 * This reduction is warranted on the grounds that the likelihood of injury was somewhat less than initially determined as all tests for respirable dust during this time were within permissible limits and taking into account the lack of prior 110(c) penalties assessed against William Rosini.
4 penalties pursuant to § 110(c), $13,400.00, as initially issued.				**4 penalties pursuant to § 110(c), $5,164.00, as modified.**

I accept the Secretary's proposed modifications to the citations, orders and proposed penalties and issue this decision based upon the parties' stipulations. I have considered the representations and documentation submitted and find that the modifications are reasonable and that the penalties proposed are appropriate under the criteria set forth in section 110(i) of the Mine Act. My decision reflects and incorporates the Commission's August 29, 2012, interlocutory decision holding that MSHA has jurisdiction over Respondent's Carbon Plant.

The parties have agreed that the penalties shall be stayed pending exhaustion of all appeals and final resolution of the jurisdictional issue. The parties have also agreed to bear their own attorney's fees, costs and other expenses incurred within any stage of the above-referenced, proceeding, including, but not limited to, attorney's fees and costs which may be available under the Equal Access to Justice Act, as amended.

ORDER

The total amount assessed for the citations at issue in these dockets is $70,900.00. I affirm each citation as set forth above. Shamokin Filler Company, Inc., is hereby **ORDERED** to **PAY** the Secretary of Labor the sum of $70,900.00 for the sixty-one violations listed above.[1] In accordance with the parties' agreement, this Order shall be **STAYED** pending exhaustion of all appeals and final resolution of the jurisdictional issue.

/s/
John Kent Lewis
Administrative Law Judge

1. Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

APPENDIX F — DECISION OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, DATED AUGUST 28, 2012

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 28, 2012

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

v.

SHAMOKIN FILLER COMPANY, INC.

Docket Nos. PENN 2009-775, -825, PENN 2010-63, 191, 275, -291, -381, -465, -515, -745, PENN 2011-16, -104, -129, -189

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

In these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and

Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Administrative Law Judge John Kent Lewis concluded that a facility operated by Shamokin Filler Co., Inc. ("Shamokin") is a "mine" subject to the jurisdiction of the Department of Labor's Mine Safety and Health Administration ("MSHA") under the Mine Act. 33 FMSHRC 725, 748-49 (Mar. 2011) (ALJ). On April 6, 2011, Shamokin filed a petition for discretionary review of the judge's decision, which the Commission denied. On April 25, 2011, it filed a petition for interlocutory review of the judge's decision, which the Commission also denied. On June 9, 2011, Shamokin filed a motion for reconsideration of the Commission's June 2 order denying its petition for interlocutory review, which the Commission granted.

Additionally, on July 29, 2011, the Secretary filed an unopposed petition for interlocutory review of the judge's prehearing order mandating that the parties submit all direct examination of each witness in written form and limiting trial testimony to cross-examination and re-direct examination. The Secretary also requested that the Commission stay the proceedings pending a final decision by the Commission. The Commission granted the Secretary's petition and also granted her request to stay the proceedings below.

For the reasons that follow, we affirm the judge's decision concluding that Shamokin's Carbon Plant is subject to jurisdiction under the Mine Act. We also vacate the judge's order directing the parties to submit advanced written direct testimony, lift the stay, and remand the case for a hearing consistent with our decision.

I.

Factual and Procedural Background

Shamokin operates a carbon products manufacturing plant ("Carbon Plant") in Shamokin, Pennsylvania, that sells products consisting solely of anthracite coal, as well as anthracite coal that is blended with other carbon materials. 33 FMSHRC at 731. The Carbon Plant also manufactures a variety of carbon-based products for the steel, glass, rubber and plastics industries. *Id.;* Tr. 402. The parties stipulated that Shamokin does not extract, wash, clean or crush coal in its Carbon Plant. 33 FMSHRC at 731; Op. Post Hearing Br. at 2, Jt. Stip. 10-14.

For the purely anthracite products, Shamokin begins with prepared anthracite coal purchased from local mines and further prepares it by putting it in a feed hopper and then drying it in an outdoor rotary dryer. 33 FMSHRC at 745; Tr. 49-51, 164, 185; G. Ex. 2; Jt. Ex. 4. After the drying, the coal is screened to remove oversized pieces. 33 FMSHRC at 745; Tr. 51. After the screening, the coal is stored and then bagged, loaded, and shipped for bulk sale. 33 FMSHRC at 745. Shamokin performs this extra processing to meet customer specifications. *Id.* at 748; Tr. 402, 406-07.

Shamokin's production chart for 2009 and 2010 shows that the company sold thousands of tons of purely anthracite coal. 33 FMSHRC at 747; Jt. Ex. 2. The chart also includes items listed as blends of coal and non-coal materials. However, as described below, statements by

Shamokin officials and a major customer suggest that some of these items were 100% coal. 33 FMSHRC at 747; Jt. Ex. 2; G. Exs. 1, 3; Tr. 110-11, 127, 129, 454-55.

Since 1977, MSHA has treated Shamokin's Carbon Plant as a mine and has inspected it for compliance with the Mine Act. G. Ex. 7 at 3. In January 2009, Shamokin changed ownership[1] and shortly thereafter challenged MSHA's jurisdiction over its facility, asserting that the facility should be subject to the jurisdiction of the Department of Labor's Occupational Safety and Health Administration ("OSHA"). 33 FMSHRC at 731; Tr. 381.

During MSHA's inspections of the facility, its inspectors observed no mixing of coal with non-coal materials at Shamokin's plant. 33 FMSHRC at 748; Tr. 50, 164, 322-23, 359. The only bid sheets that Shamokin provided for its sales were for anthracite coal. 33 FMSHRC at 748; G. Ex. 5. Shamokin also admitted that in 2009 and 2010, the vast majority of its purchases were of anthracite coal. G. Ex. 6. Based on such considerations, MSHA rejected Shamokin's assertions that its operations and business had changed to manufacturing since new owners took over in 2009. G. Ex. 7 at 3. Instead, MSHA determined that Shamokin's facility continued to be subject to MSHA's jurisdiction as a coal preparation plant. G. Ex. 7 at 4.

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1. Shamokin's prior owners are brothers and are also the fathers of the current owners. The prior owners are still on Shamokin's payroll as Shamokin's consultants. 33 FMSHRC at 731 n.7; Tr. 383, 385.

Shamokin timely contested all of the citations at issue in these proceedings,[2] specifically disputing that MSHA had jurisdiction over the facility. A trial solely on the issue of jurisdiction was conducted on October 27 and 28, 2010.

Below, Shamokin sought to compel the Secretary to produce internal memoranda prepared by the Department of Labor's Office of the Solicitor and MSHA's District Manager. These memoranda addressed other bagging facilities that Shamokin claimed were identical to its Carbon Plant and which it asserted MSHA and the Solicitor's Office had determined were not mines subject to regulation under the Mine Act, but were rather under OSHA's jurisdiction. The Secretary withheld these documents during discovery, claiming they were privileged. Shamokin also sought to submit at the hearing evidence related to MSHA's inspection activity, or lack thereof, at facilities other than the Carbon Plant. Shamokin argued that such evidence was relevant to establish that MSHA had previously determined in 2004 that its Carbon Plant, along with other similar bagging facilities, was not a mine subject to MSHA jurisdiction.

The Secretary filed a motion *in limine* seeking to exclude the foregoing evidence. The judge granted the Secretary's motion *in limine* and denied Shamokin's motion to compel. Unpublished Order Granting Secretary's

2. In Shamokin's Motion for Reconsideration, it indicated that at that time, approximately 14 civil penalty dockets were pending, resulting from inspections conducted in 2009, 2010 and 2011, in which Shamokin has challenged MSHA's jurisdiction as well as the factual basis for the citations. Mot. for Reconsideration at 3.

Motion *in Limine* dated Oct. 27, 2010 *("Limine* Order"); Unpublished Order Denying Respondent's Motion to Compel dated Oct. 27, 2010 ("Mot. to Compel Order"); 33 FMSHRC at 728-31. The judge reviewed the documents *in camera.* He determined that they were not relevant to the question of MSHA's jurisdiction over Shamokin, as they did not reference Shamokin specifically or the alleged "bagging facilities" in general, and noted that such inquiries were fact-specific. 33 FMSHRC at 729-31, 743 n.13; *Limine* Order. The judge also concluded that the Department of Labor's memoranda were privileged and not subject to disclosure. Mot. to Compel Order. The judge concluded that Shamokin failed to prove that MSHA had previously made a specific determination that its Carbon Plant was not subject to MSHA jurisdiction.[3] 33 FMSHRC at 742-43.

In his decision on jurisdiction, the judge concluded that Shamokin's Carbon Plant meets the definition of a "mine" under section 3(h) of the Mine Act. 33 FMSHRC at 727-28, 744, 748. Recognizing the Congressional intent of giving the broadest possible interpretation to what is to be considered a mine and regulated under the Mine Act, the judge held that "the Carbon Plant falls within

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3. Shamokin moved to certify the judge's decision granting the Secretary's motion *in limine,* which the judge denied. Unpublished Order Denying Respondent's Motion to Stay, Order Denying Respondent's Motion to Certify Decision for Interlocutory Review dated Oct. 27, 2010. Shamokin then filed with the Commission a petition for interlocutory review on the matter, which the Commission also denied. Unpublished Order dated Dec. 10, 2010.

the 'sweeping' definition of a mine engaged in the work of preparing coal, and thus, should remain subject to MSHA jurisdiction." *Id.* at 745 (citation omitted). Based on the plant's activities of storing, loading, sizing and drying coal for the purpose of sale for further industrial use, the judge concluded that Shamokin's operation was a "custom coal preparation facility." *Id.* at 746. The judge was cognizant of the operator's arguments that not every facility that handles minerals is a mine and specifically considered the nature of Shamokin's operations. *Id.* at 745. He concluded that the nature and function of Shamokin's operations constituted the "work of preparing coal" as defined in the Mine Act. *Id.* at 746.

The judge rejected Shamokin's argument that the majority of its products sold were non-coal or primarily coal/non-coal mixtures. Specifically, the judge found that the owners attempted "to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations." *Id* at 747. The judge found that the evidence "*in toto* clearly establishes that a substantial portion of the material used by [Shamokin] was anthracite coal." *Id.* at 746. Further, the judge considered the Commission's functional analysis in *Oliver M Elam, Jr., Co.,* 4 FMSHRC 5, 7-8 (Jan. 1982), and specifically noted that the Carbon Plant's operation performed the work usually done by coal preparation facilities to make coal suitable for a particular use or to meet market specifications. 33 FMSHRC at 748.

On May 20, 2011, the judge issued a notice of hearing scheduling a hearing on September 6, 2011, on the merits of the violations in these consolidated proceedings.[4] In the order, the judge directed the parties to

> submit all direct examination of each witness in written form at least 48 hours prior to the hearing. The direct examination shall be in the form of an affidavit, signed under oath and shall include only items that are appropriate for direct examination of the witness. All exhibits used by the witness must be numbered (or lettered) and attached to the direct testimony. The witness must appear at hearing and will be subject to cross-examination and redirect examination only. The parties may present, at hearing, any objection to the written direct examination or attached exhibits. Failure to include a witness, to provide the written direct examination or failure to include an exhibit or to specify in detail the items that remain in dispute, will result in their exclusion at hearing.

Unpublished Order dated May 20, 2011.

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4. The merits proceeding involves 11 civil penalty cases, which include 58 citations alleging violations of MSHA standards, including six section 104(d) orders, and one section 110(c) case concerning four section 110(c) penalty assessments against one of Shamokin's owners, William Rosini. Unpublished Order Denying Mot. for Reconsideration dated June 23, 2011 at 4-5.

On June 16, 2011, the Secretary filed a Joint Motion for Reconsideration of the judge's order pertaining to his instruction on testimony, which the judge denied. Unpublished Order dated June 23, 2011. The judge found that "the legal issues ... identified in the motion *sub judice* will be adequately and efficiently addressed by this Court's prehearing report requirements." *Id.* at 4-5. On July 15, 2011, the Secretary filed a motion to certify the June 23, 2011 order for interlocutory review and a motion to stay proceedings pending a final decision by the Commission. The judge denied both motions without explanation. Unpublished Order dated July 18, 2011. The Commission granted the Secretary's petition for interlocutory review of the judge's June 23 order on the issue of the judge's requirement of advanced written direct evidence and also granted her request to stay the proceedings below. Unpublished Order dated Aug. 10, 2011.[5]

II.

Disposition

A. Jurisdiction

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.

5. Shamokin's petition for interlocutory review, addressing both the judge's conclusion on jurisdiction and his exclusion of the evidence of MSHA's enforcement actions at other facilities, was also granted in this order.

Under section 3(h)(1) of the Mine Act, "coal or other mine" is defined as including "lands, ... facilities, equipment, machines, tools, or other property ... used in, or to be used in ... the work of preparing coal ... and includes custom coal preparation facilities." 30 U.S.C. § 802(h)(1). Section 3(i) of the Mine Act defines "work of preparing the coal" as "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).

The legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a "coal or other mine" under the Act. The Senate Committee stated 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, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 602 (1978). *See 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.").

In considering the phrase the "work of preparing the coal," the Commission has inquired not only into whether the entity performs one or more activities listed in section

3(i), but also into the nature of the operation performing such activities. *Elam,* 4 FMSHRC at 7-8. In *Elam,* the Commission explained that "'work of preparing [the] coal' connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications." *Id.* at 8. The Commission noted that the purpose of coal preparation has been described as increasing the value of fuel by making it more suitable for uses by the consumer in part by "mixing or blending." *Id.* at 8 n.5. The Commission concluded that although Elam performed several of the functions included in coal preparation at its commercial loading dock, it did so solely to facilitate its loading business rather than to meet customers' specifications or to render the coal fit for any particular use, and that, accordingly, its facility was not a mine. *Id.* at 8.

In contrast, in *Mineral Coal Sales, Inc.,* 7 FMSHRC 615, 620 (May 1985), the Commission determined that the handling of coal at a loading facility constituted the "work of preparing the coal" because the work was performed to make the coal suitable for a particular use or to meet market specifications. Such handling included custom blending or mixing the coal to meet the specifications and needs of a broker's customers, in addition to storing, crushing, sizing, and loading the coal on to railroad cars. *Id.* at 616-18, 620.

The Commission and courts have consistently applied a version of the two-part analysis set forth by the Commission in *Elam* to determine whether a facility is

engaged in the "work of preparing the coal" by considering: (1) whether the facility performs any of the enumerated activities listed in section 3(i); and (2) the overall nature of the operation to determine whether it engages in the work of preparing coal "as is usually done by the operator of the coal mine" or whether it functions to make the coal suitable for a particular use or to meet market specifications. *See, e.g., RNS Servs., Inc.,* 18 FMSHRC 523, 528-30 (Apr. 1996) (concluding that the loading of coal refuse into trucks was one of the activities listed in section 3(i) and that the transportation of coal refuse to a co-generation facility constituted "work of preparing the coal"), *aff'd,* 115 F.3d 182, 185 (3d Cir. 1997) (noting that the storage and loading of coal was "a critical step in the processing of minerals ... in preparation for their receipt by an end-user, and [that] the Mine Act was intended to reach all such activities"); *Air Prods. & Chems., Inc.,* 15 FMSHRC 2428, 2431 (Dec. 1993) (holding that the handling of coal refuse at a co-generation facility involved some of the coal preparation activities listed in section 3(i) and constituted the "work of preparing the coal" that is usually done by a mine operator), *review denied,* 37 F.3d 1485 (3d Cir. 1994) (table, No. 93-3646).

The judge correctly utilized this analytical framework when considering whether Shamokin's Carbon Plant performed the "work of preparing the coal." The judge found that Shamokin engaged in a number of the activities listed in section 3(i) - specifically that it "is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce."

33 FMSHRC at 749. He noted that, "[i]n examining the 'nature of the operation' performing work activities listed in section 3(i), the operations taking place at a single site must be viewed as a collective whole." *Id.* (citing *Mineral Coal Sales,* 7 FMSHRC at 620-21). The judge also stated that "in applying a functional analysis to the subject facility, this Court finds that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use." 33 FMSHRC at 746.

There is no dispute that Shamokin engages in certain activities listed in section 3(i) as comprising the "work of preparing the coal." The judge found that Shamokin stores, loads, sizes and dries coal at its Carbon Plant. *Id.* Substantial evidence supports the judge's finding.[6] Moreover, Shamokin does not dispute these findings on appeal.

The heart of Shamokin's argument before the Commission is that the judge erred by ignoring language that assertedly limits the phrase "work of preparing the coal" – the last clause of section 3(i), which states

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6. 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 *Consol. Edison Co. of New York v. NLRB,* 305 U.S. 197, 229 (1938)).

"as is usually done by the operator of the coal mine."[7] The language of section 3(i) which Shamokin highlights has been considered by the Commission and courts in past cases under the second prong of the *Elam* test or the "functional" analysis. *Elam,* 4 FMSHRC at 7-8; *Pennsylvania Electric Co.,* 11 FMSHRC 1875, 1880-81 (Oct. 1989), *aff'd,* 969 F.2d 1501 (3d Cir. 1992); *United Energy Servs. Inc. v. MSHA,* 35 F.3d 971, 975 (4th Cir. 1994). The judge did consider the statutory language regarding whether the activities involved were usually done by the mine operator. 33 FMSHRC at 745-46. He specifically cited and applied the *Elam* test and acknowledged that an operation's performance of any of the enumerated activities under section 3(i) does not *per se* subject it to jurisdiction, but rather that a "functional" analysis is necessary. *Id.* at 746-48. The judge considered the Carbon Plant's handling of coal as compared to its non-coal products and, contrary to Shamokin's assertions, determined *in toto* that the majority of the plant's products consisted primarily of coal. *Id.* Applying the *Elam* test, the judge concluded that Shamokin processes coal "to customer's specifications and for particular uses" and thus operated as a "custom coal preparation facility." *Id* at 748-49.

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7. Contrary to the Secretary's contention, S. Response Br. at 12, Shamokin did raise this issue before the judge below. Op. Reply Br. at 9, n.1.; Op. Post-Hearing Br. at 13; Op. Br. at 8-11. Although the Secretary is correct in noting that Shamokin failed to present evidence to support its argument and failed to develop its argument below, it is proper for the Commission to consider and address Shamokin's argument on appeal.

Substantial evidence supports the judge's findings. In Shamokin's product table, the judge found that one of its highest volume products (585 Injection Carbon), although listed as a mixed-product, was marketed as primarily coal. *Id.* at 747; Jt. Ex. 2. John Petrulich, Shamokin's former production manager, testified that the carbon was added merely as a filler and did not alter the properties of the coal. 33 FMSHRC at 732. Moreover, the judge noted that a sworn declaration from a customer of Shamokin indicated that the product was marketed to him as 100% coal. *Id.* at 747; G. Ex. 1. Additionally, in an email from William Rosini to a customer, Rosini indicated that Shamokin B-593 was "100 percent anthracite coal and barley size." 33 FMSHRC at 733, 748; Tr. 110. The judge did not find Shamokin's witnesses to be credible regarding the scope and nature of the facility's handling of coal and concluded that "there has been an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations."[8] 33 FMSHRC at 747. MSHA inspectors Matthew Bierman and Ronald Farrell testified that they did not observe any mixing of coal with non-coal materials at the plant, which the judge found was supported by the plant production reports. *Id.* at 748. The judge also found

8. To the extent that Shamokin attempts to challenge the judge's credibility determinations as to the characterization of its facility, Shamokin fails to point to any evidence sufficient to overturn those determinations. *See Farmer v. Island Creek Coal Co.,* 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that a judge's credibility determinations are entitled to great weight and may not be overturned lightly).

that the only bid sheets Shamokin provided for its sales were for anthracite coal. *Id.;* G. Ex. 5. William Rosini even admitted that the facility processed coal according to customer specifications. 33 FMSHRC at 740; Tr. 524. In short, Shamokin fails to point to any persuasive evidence to support its contention that it is primarily a manufacturing facility and not a coal processing facility.

Clearly, Shamokin's facility—its activities, function and purpose—are akin to the activities and purpose of the operator in *Mineral Coal Sales,* rather than the operator in *Elam.* It dries and sizes processed coal to meet customer specifications. It stores and loads the coal into bags for resale and subsequent use. Significantly, Shamokin is not handling the coal for its own consumption and thus is unlike the facilities in cases involving utilities or co-generation facilities where some courts have found Mine Act jurisdiction did not extend. *See, e.g., Associated Elec. Coop., Inc.,* 172 F.3d 1078, 1083 (8th Cir. 1999) (applying *Elam* and stating that Associated "did not participate in transporting the coal from the mine, nor were its processing activities necessary to make the coal marketable"; thus it was not a "mine" by further processing the coal for combustion). In fact, Shamokin engages in more coal preparation activities than the facilities in *Mineral Coal Sales,* 7 FMSHRC at 620; *Air Products,* 15 FMSHRC at 2431; and *RNS,* 18 FMSHRC at 528-30, all found to be subject to MSHA jurisdiction. As the judge found, Shamokin's Carbon Plant functions as a custom coal preparation facility. While the Carbon Plant handles non-coal materials and makes non-coal products, such as graphite pellets, MSHA is not interested

in Shamokin's graphite process. 33 FMSHRC at 732; Tr. 55-56. The evidence indicates that a substantial portion of Shamokin's business, contrary to its assertion, involves the handling and processing of anthracite coal.

Shamokin argues that, according to precedent, a facility that handles only processed, market-ready coal is not engaged in the "work of preparing the coal." Shamokin contends that its further refinement of this type of coal falls outside of the jurisdiction of the Mine Act. We disagree. The Commission and courts have never held a bright-line distinction between facilities that handle raw coal as compared to facilities that handle processed, marketable coal. In fact, the Commission and courts have evaluated a particular facility's operations *in toto* and considered the nature of the coal in conjunction with the types of coal preparation activities performed by the facility in question, and evaluated the end product rather than the initial state of the coal. In *Kinder Morgan* and *Mineral Coal Sales,* the Commission and court of appeals found jurisdiction over facilities that handled already processed, market-ready coal because the coal was subsequently prepared by those facilities to make it "suitable for a particular use or to meet market specifications." *Kinder Morgan Operating, L.P.,* 23 FMSHRC 1288, 1294 (Dec. 2001) (Commissioners Jordan and Beatty), *aff'd,* 78 Fed. Appx. 462, 465 (6th Cir. 2003); *Mineral Coal Sales,* 7 FMSHRC at 616-18, 620. Here, Shamokin clearly engaged in further handling or processing of the coal in order to meet its customers' specifications.

Accordingly, the judge was correct in concluding that the Carbon Plant performs the "work of preparing the coal," and thus is a "mine" under section 3(h) and subject to jurisdiction under the Mine Act.[9]

B. Exclusion of Evidence

Shamokin contends that the judge abused his discretion by excluding evidence of MSHA's non-jurisdiction determinations regarding other bagging facilities similar to its Carbon Plant. The operator argues that this evidence is relevant to whether the judge should defer to the Secretary's interpretation that sections 3(h) and (i) of the Mine Act afford her jurisdiction. It claims that the evidence "revealed inconsistent treatment of direct competitors who manufacture the same products, in the same way, using the same ingredients – and also demonstrat[ed] that carbon plants MSHA released from its jurisdiction actually had more indicia of 'mining' than did Shamokin." Op. Br. at 24.

The judge considered the evidence in *camera* and excluded it because he determined it to be "irrelevant and/or, if relevant, unduly confusing and misleading." 33 FMSHRC at 729. He concluded that it was not relevant because it did not specifically pertain to Shamokin or generally to the group of bagging facilities of which Shamokin contends it was a part. The judge also

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9. Shamokin also argues that the judge erred in finding that the Carbon Plant was engaged in "milling." Because this issue is not essential to the resolution of the issue of jurisdiction in this case, we do not need to address it.

determined that the evidence was of little probative value.'[10] *Id.* at 730 n.6.

When reviewing a judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). "Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial." *Marfork Coal Co.,* 29 FMSHRC 626, 634 (Aug. 2007) (citation omitted). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero,* 22 FMSHRC at 1366 (citations omitted).

Commission Procedural Rule 63(a) states that "[r]elevant evidence ... that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Commission Procedural Rule 55(i) states that "a Judge is empowered to ... (i) [t]ake other action authorized by these rules, by 5 U.S.C. 556, or by the Act." 29 C.F.R. § 2700.55(i). Section 556(d) of the Administrative Procedure

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10. The judge cited Federal Rule of Evidence 403, which states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." 33 FMSHRC at 729. A judge's reference to excluded evidence as not being "probative" is essentially the same standard as the relevance standard in Commission Procedural Rule 63(a). *See, e.g., Twentymile Coal Co.,* 30 FMSHRC 736, 764 n.8 (Aug. 2008) (Commissioners Jordan and Cohen).

Act, in turn, states that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

The memoranda Shamokin sought to obtain and submit into evidence were written in 2004 and earlier by attorneys in the Office of the Solicitor and by MSHA's District Manager when MSHA formed a fact-finding committee to investigate several coal bagging facilities and address the issue of jurisdiction. *See, e.g.,* Op. Ex. 2. The memoranda indicate that MSHA engaged in fact-specific inquiries of each facility to determine whether it functioned as a "mine" under the Mine Act. In one instance, MSHA determined that the facility was not engaged in mining-related activities as defined under the Mine Act and thus was not properly subject to Mine Act jurisdiction. The other facility was determined to be subject to MSHA jurisdiction. Contrary to Shamokin's assertion, no general determination was made as to the bagging facilities as a whole and as the judge found, MSHA never made an offer to Shamokin to "opt out" of MSHA jurisdiction. 33 FMSHRC at 742-44.

We agree that the memoranda are not relevant to the judge's consideration of whether Shamokin's Carbon Plant is subject to Mine Act jurisdiction. It is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction. *See Mach Mining, LLC,* 34 FMSHRC _, slip op. at 24, 26, No. LAKE 2010-1-R et al. (Aug. 9, 2012) (affirming judge's exclusion of

ventilation plans at other mines because only conditions at operator's mine are relevant to district manager's determination of which plan provisions should be approved or denied); *Twentymile Coal Co.*, 30 FMSHRC at 765 (Commissioners Jordan and Cohen) (upholding the judge's denial of the admission of other plans into evidence in an emergency response plan case because it was unlikely that two underground coal mines would present exactly the same factual situation). In any event, the Commission has previously stated that the question of jurisdiction is "governed by the statute, rather than by which of two conflicting interpretations by the Solicitor is correct." *Alexander Bros., Inc.*, 4 FMSHRC 541, 543 (Apr. 1982).

Moreover, allowing Shamokin to present evidence that may be of limited probative value would have unduly delayed the trial. Shamokin would have been required to present evidence on each of the other facilities in order to demonstrate the similarities between those facilities and its Carbon Plant and thereby the relevance of MSHA's evaluation of those other facilities. This would have necessitated a significant number of additional witnesses, consuming an inordinate amount of trial time.

It is significant that MSHA has asserted jurisdiction over Shamokin's Carbon Plant for decades and Shamokin admits that the nature of its business has not changed. 33 FMSHRC at 742; Op. Ex. 5 at 2; G. Ex. 7, at 3. Thus, there appears to be no change in the underlying facts or law supporting Mine Act jurisdiction. Accordingly, we conclude that the judge did not abuse his discretion in excluding the evidence.

C. Limitations on the Presentation of Trial Testimony

The Secretary argues, and Shamokin agrees, that the judge erred in requiring the parties to submit all direct testimony in the form of affidavits prior to the beginning of the hearing.[11] This is an issue of first impression for the Commission.

Commission Rule 63(b) provides:

> The proponent of an order has the burden of proof. A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

29 C.F.R. § 2700.63(b).

The Commission's Procedural Rules and the language of Rule 63 do not explicitly address whether a Commission judge may order the parties to submit written direct testimony in advance of the hearing. Where a regulation is determined to be ambiguous, courts have deferred to the administering agency's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor*

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11. These consolidated proceedings involve 62 violations. Unpublished Order dated June 23, 2011 at 4-5. The Secretary anticipates presenting the testimony of at least nine witnesses. *Id.* Shamokin is expected to call seven witnesses. *Id.*

v. Western Fuels-Utah, Inc., 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'"), *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted). Moreover, the interpretation of Rule 63 involves a substantial question of policy as to the Commission's administration of its own proceedings. Accordingly, the Commission is entitled to deference regarding a reasonable interpretation of its own rule.

The language of Rule 63(b) can be interpreted either one of two ways. First, the provision can be read as giving a party the right to determine without limitation whether it will present "oral or documentary evidence" at an adjudicatory hearing. Alternatively, the clause "as may be required for a full and true disclosure of the facts" could be read to limit a party's entitlement to "present his case or defense by oral or documentary evidence."

Interpreting Rule 63(b) as giving parties the right to present oral direct testimony avoids potential prejudice to the parties and practical problems. A requirement to submit written direct testimony may substantially limit the parties' ability to fully and fairly present their case. For example, it may be difficult for parties to secure the written testimony of adverse witnesses or witnesses not under the parties' control or direction. A party is able to subpoena such a witness to appear at a hearing under Rule 60, but there is no provision to subpoena a witness to obtain his or her written testimony.

Second, the ability of the respondent to present its defense could be compromised. The respondent would have to prepare its written direct testimony anticipating every possible line of proof that the Secretary could conceivably rely on in her case-in-chief.

Third, it may undermine the judge's ability to assess the credibility of witnesses. The parties are deprived of the opportunity to establish the credibility of their witnesses before adversarial cross-examination.

Fourth, it makes it problematic to adequately present documentary evidence. Frequently, Mine Act cases involve technical maps, diagrams and pictures which require explanation by the witness who is presenting the exhibit.

Interpreting Rule 63(b) as permitting parties the right to choose the form in which evidence is presented is also consistent with the Administrative Procedure Act ("APA"). The language of Rule 63(b) mirrors the language of section 556(d) of the APA, which provides in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.... *A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* In rule making or determining claims for money or benefits or applications for initial licenses an

> agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 556(d)(emphasis provided)[12]

Thus, section 556(d) specifically permits an agency to adopt procedures for the submission of all or part of the evidence in written form if a party is not prejudiced in doing so, in three limited situations: (1) rulemaking; (2) determining claims for money or benefits; or (3) applications for initial licenses. Clearly, none of these three exceptions applies to Commission adjudicatory hearings. If the preceding sentence of section 556(d) were to be read as permitting the adjudicatory agency the right to dictate the form of evidence, then it would be unnecessary for Congress to have explicitly provided that right in the following sentence where the three specified situations are set forth. Interpreting the pertinent language of section 556(d) as the parties suggest gives full effect to the language of the entire provision. It is an elementary rule of statutory construction that effect must be given to every word, clause and sentence in a statute, and that it should be construed so that effect is given to all its

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12. The Mine Act makes clear that the APA does not generally apply to Mine Act proceedings, except to the extent provided explicitly under the Act. 30 U.S.C. § 956. Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in pertinent part: "the Commission shall afford an opportunity for a hearing ... in accordance with section 554 of Title 5." Section 554(c)(2) of the APA, in turn, makes section 556 applicable to adjudicatory proceedings. 5 U.S.C. § 554(c)(2).

provisions so that no part will be superfluous. Norman J. Singer, 2A Sutherland Statutory Construction, § 46:6 (7th ed. 2011); *Clifford F. MacEvoy Co. v. United States,* 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'") (citation omitted).

Based on the foregoing, we interpret Rule 63 as giving the parties the right to present oral direct testimony at a hearing and conclude that the judge erred in ruling otherwise. While the Commission's administrative law judges are accorded broad discretion in their conduct of proceedings before them, such conduct must comply with the Commission's procedural rules and applicable provisions of the APA.

III.

Conclusion

For the foregoing reasons, we affirm the judge's conclusion that Shamokin's Carbon Plant is a "mine" subject to jurisdiction under the Mine Act. We also vacate the judge's order requiring the parties to submit written testimony and remand the case for a hearing in accordance with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioner Duffy, concurring:

I join my colleagues in affirming the decision below.

First, the judge did not err in concluding that the Shamokin Carbon Plant could be deemed subject to Mine Act jurisdiction. Nor did he err in excluding evidence relating to MSHA's decision not to assert jurisdiction over other facilities that arguably conducted activities similar to those conducted at the Shamokin Plant.

In determining whether or not to subject a particular facility to MSHA rather than OSHA jurisdiction, the Mine Act gives the Secretary broad discretionary power to allocate her personnel and resources as she sees fit so long as the activity conducted at the facility in question falls within the rather extensive scope of mining and mineral processing as defined in sections 3(h) and (i) of the Act.

Moreover, notwithstanding Shamokin's efforts to align itself with facilities deemed by MSHA not to fall within that agency's purview, section 3(h) contemplates that matters of jurisdiction are to be decided on a case-by-case basis. Therefore, the judge's conclusions here are supported by substantial evidence, and I do not find that he abused his discretion in excluding evidence regarding other facilities.

Having said all that, however, just because the Secretary *may* elect to assert Mine Act jurisdiction over a given facility doesn't necessarily mean that she *should* do so, and while the Act gives the Secretary ultimate authority in that regard, I have serious concerns, as a

matter of policy, with her decision to do so under current circumstances.

According to MSHA's website, in 1969, the year the original Coal Mine Health and Safety Act was passed, there were 419 anthracite mines that produced 10.25 million tons, and 111 anthracite preparation plants.[1] In 1978, when the current Mine Act took effect, there were 216 anthracite coal mines that produced about 4 million tons, and 62 preparation plants. MSHA's statistics for 2008 list 116 anthracite mines that produced 1.7 million tons, and 41 preparation plants.[2]

While the number of actual mines and the actual tonnage produced at those mines has decreased by one-half since 1978, the number of preparation plants has decreased by only one-third during that same period. So it would seem to me that in order to maintain some presence in MSHA District 1, where the anthracite industry is in its last throes, MSHA may be motivated to categorize

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1. *Table 12A- Count of Operations at Pennsylvania Anthracite Mines in the U.S.,* 1931-77, MSHA.GOV, http://www.msha.gov/STATS/PART50/WQ/1931/wq31an12.asp (last visited Aug. 24, 2012); *Table 11A- Production in Short Tons,* MSHA.GOV, http://www.msha.gov/STATS/PART50/WQ/1931/wq31an11.asp (last visited Aug. 24, 2012).

2. *Table 01. Number of Anthracite Operations in the U.S., 1978-2008,* MSHA.GOV, http://www.msha.gov/STATS/PART50/WQ/1978/wq78an0l.asp (last visited Aug. 24, 2012); *Table 02. Anthracite Production in Short Tons,* MSHA.GOV,

http://www.msha.gov/STATS/PART50/WQ/1978/wq78an02.asp (last visited Aug. 24, 2012).

an enterprise that handles coal in some fashion as a coal preparation facility subject to Mine Act jurisdiction.

That may have all been to the good in 1978, but due to recent legislation and enhanced Congressional oversight, MSHA as an agency has much more on its enforcement plate than it did thirty-five years ago. Moreover, MSHA's website indicates that coal fatalities are currently running 30% higher than they were during the same period last year.[3]

Consequently, it would seem counterintuitive that MSHA would choose to deploy its scarce resources to inspecting what is essentially a bagging operation that could just as easily be processing pet food or fertilizer as barley-sized coal, rather than allocating its inspection force to those facilities where actual and traditional coal extraction and processing are taking place.

As for the second issue on review, I believe the judge erred in requiring the parties to submit written testimony in advance of trial rather than allowing them to proceed to trial for the taking of oral testimony. My colleagues thoroughly explore the practical problems associated with proceeding according to the judge's order. Moreover, I agree with my colleagues that Commission Rule 63(b) affords the parties the right to make their case through oral testimony, and our judges cannot abridge that right without the agreement of the parties.

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3. *2012 Comparison of Year-to-Date and Total Fatalities for MINM & Coal,* MSHA.GOV, http://www.msha.gov/stats/daily/d2012bar.pdf (last updated Aug. 1, 2012).

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

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APPENDIX G — DECISION OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, OFFICE OF ADMINISTRATIVE LAW JUDGES, DATED MARCH 11, 2011

FEDERAL MINE SAFETY
AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER
875 GREEN TREE ROAD, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412) 920-7240/ FAX:(412) 928-8689
March 11, 2011

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

Petitioner

v.

SHAMOKIN FILLER COMPANY INC.,

Respondent

Appendix G

SHAMOKIN FILLER COMPANY, INC.,

Contestant

v.

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

Respondent

SHAMOKIN FILLER COMPANY, INC.,

Contestant

v.

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

Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 2009-775
A.C. No. 36-02945-194224

Docket No. PENN 2009-825
A.C. No. 36-02945-197364

Appendix G

Docket No. PENN 2010-63
A.C. No. 36-02945-200482

Mine: Carbon Plant

CONTEST PROCEEDINGS

Docket No. PENN 2009-736-R
Citation No. 7011691; 8/12/09

Docket No. PENN 2009-737-R
Citation No. 7011692; 8/12/09

Docket No. PENN 2009-738-R
Citation No. 7011691; 8/13/09

Docket No. PENN 2009-739-R
Citation No. 7011952; 8/20/09

Docket No. PENN 2009-740-R
Citation No. 7011695; 8/25/09

Docket No. PENN 2009-741-R
Citation No. 7011696; 8/25/09

Docket No. PENN 2009-742-R
Citation No. 7011697; 8/25/09

Docket No. PENN 2009-763-R
Citation No. 7011699; 8/27/09

Docket No. PENN 2009-776-R
Citation No. 7011700; 8/31/09

Docket No. PENN 2009-777-R
Citation No. 7011781; 8/12/09

Docket No. PENN 2009-778-R
Citation No. 7011782; 8/31/09

Docket No. PENN 2009-779-R
Citation No. 7011783; 8/31/09

Docket No. PENN 2009-780-R
Citation No. 7011784; 9/01/09

Mine: Carbon Plant
Mine ID: 36-02945

DECISION

Appearances: Jessica R. Brown, Esquire, Office of the Solicitor, US Department of Labor, Philadelphia, Pennsylvania, for the Petitioner Adele L. Abrams, Esquire, CMSP, and Diana R. Shroeher, Esquire, for the Respondent, Shamokin Filler Company, Inc.

Before: Judge John Kent Lewis

Appendix G

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* ("the Act").

The petitions for assessment of civil penalties and associated contest matters in the above-captioned dockets were consolidated for hearing by ALJ Alan G. Paez, who was originally assigned to the case.

By consent of the Court and the parties, the sole question at trial would be limited to whether the federal Mine Safety and Health Administration ("MSHA") has jurisdiction over the subject facility, Carbon Plant.

During the period of discovery, this case was reassigned to the undersigned ALJ on September 10, 2010, by an order of reassignment from Chief ALJ Robert J. Lesnick. The hearing date and location were unaltered by the reassignment. Several motions were filed by the parties prior to hearing.[1]

On September 27, 2010, The Secretary of Labor ("Secretary") filed with this Court a motion *in limine* to

1. These motions, *inter alia,* included Secretary's Motion *in Limine* to Exclude the Expert Witness Testimony of Lawrence Gazdick, filed on September 27, 2010, and denied on October 13, 2010; Secretary's Motion *in Limine*, filed on September 27, 2010, and granted on October 27, 2010; Secretary's Motion to Quash Subpoena, filed on October 18, 2010, and granted on October 20, 2010; and Respondent's Motion to Compel, filed on October 19, 2010, and denied on September 27, 2010.

preclude any evidence of MSHA inspection activity, or lack thereof, at any facility in the United States other than the Respondent's Carbon Plant. On September 27, 2010, for reasons discussed *infra,* this Court, after full hearing and argument, granted Secretary's motion. Pursuant to Commission Rule 70, 29 C.F.R. § 2700.70, Shamokin Filler Company, Inc. ("Respondent") moved for stay of the proceedings and requested certification for interlocutory review by the Commission. This Court denied such[2] and the case thereupon proceeded to trial on September 27-28, 2010 in Harrisburg, PA.

LEGAL PRINCIPALS

Section 3(h)(1) of the Act defines "mines" that are intended to be covered under the Act. Section 3(h)(i) provides:

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

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2. By Order dated December 10, 2010, the Commission denied Respondent's motion for interlocutory review.

> or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]
>
> Section 3(h)(2)(i) of the Act further defines "the work of preparing coal". Section 3(h)(2)(i) 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[.]

The MSHA/OSHA[3] Interagency Agreement of 1979 ("MOU") further clarifies the jurisdiction of each agency. Concerning jurisdictional disputes, Point 5 of the MOU provides that:

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3. OSHA refers to the Occupational Health and Safety Administration.

> The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

PROCEDURAL HISTORY

Motion in limine

A preliminary evidentiary issue before this Court was whether Secretary's motion *in limine* to preclude evidence of MSHA's exercise of jurisdiction in facilities other than Respondent's Carbon Plant should be granted. This Court notes that MSHA's jurisdiction over an individual facility must be decided on a case-by-case basis, looking at both the statutory language and the nature and purpose of the specific facility. *Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992).

The Respondent argued that the Court should have heard evidence regarding MSHA's lack of exercise of

jurisdiction over certain "bagging operations" similar to Respondent's, including MSHA's past deliberations and determinations regarding such. However, this Court holds that such evidence would be irrelevant to and, indeed, detrimental to resolving the critical jurisdictional questions of what the Carbon Plant has been, and is as a facility, and what it has done, and is doing in its operation and processes. (Emphasis added.)

Given that the fundamental jurisdiction inquiry before this Court involves the specific activities and operations of Respondent's particular Carbon Plant facility, this Court found that Respondent's proposed evidence pertaining to some other similar facilities would be essentially irrelevant. See *Ohio Valley Transloading Company,* 19 FMSHRC 813, 813 (Apr. 1997)(Only the facts pertaining to the subject facility were relevant).

Although Commission Rule 63, 29 C.F.R. § 2700.63, states that relevant evidence may be presented as long as it is not unduly repetitious or cumulative, the Rules do not define "relevancy" or its limitations. Therefore, the Commission may look to the Federal Rules for guidance. *Cactus Canyon Quarries of Texas,* 23 FMSHRC 280, 287 (2001). Pursuant to Rule 403 of the Federal Rules of Evidence, it is provided that evidence, although relevant, may be excluded if its probative value is, *inter alia,* substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if such introduction involves waste of time or needless presentation of cumulative evidence.

Presentation of evidence of MSHA's lack of enforcement at other similar facilities involves all of the foregoing pejorative evidentiary consequences. This Court finds that it would be cumbersome and impractical to begin the evaluation of the Carbon Plant's jurisdictional question with a review of whether and why MSHA has exercised or should exercise jurisdiction over similar "bagging facilities" located in both the Carbon Plant's specific geographical area and in other parts of the country.

In its prehearing pleading and argument, Respondent requested permission to present evidence that other similar "bagging operations" – principally Keystone Filler and Kimmel – were no longer under MSHA jurisdiction and were <u>direct competitors</u> of Respondent.[4] (Emphasis added.)

This Court rejected said request and granted the Secretary's motion *in limine* on the grounds that such evidence would be irrelevant and/or, if relevant, unduly confusing and misleading. Ultimately, this Court had to consider whether such evidence would aid it as trier of fact and law in deciding the issue of jurisdiction. For reasons set forth below, this Court found that the admission of such evidence to be utilized in a comparative analysis of similar facilities to that of Carbon Plant would be improper and unreasonable.

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4. This court finds that evidence showing that a facility is in competition with another facility for some of its products may have little relevance or materiality when determining jurisdiction. Facilities may be distinctly different in overall function and character, but still may offer some similar products, placing themselves in competition for a particular product.

This Court finds no appellate case law on point regarding the admissibility of alleged similar facility evidence to establish jurisdiction. However, after careful consideration, this Court is convinced that a comparative facility analysis approach to jurisdiction is improper. Rather than considering the specific characteristics of a particular facility – which is the usual analytical approach in almost all Mine Act cases – the decision-maker must instead engage in unnecessary and often confusing collateral review.

While the ALJ holding in *Dicaperl Minerals Corp.*, 28 FMSHRC 720 (July 2006), has no binding effect, this Court finds the rationale of ALJ Manning in ultimately rejecting similar facility evidence as to jurisdiction to be compelling. In *Dicaperl Minerals,* the subject plant was a free standing perlite (volcanic glass) expansion facility. *Id.* The plant was not located at or adjacent to a quarry. *Id.* The plant operator offered evidence that most, if not all, other perlite plants that were "geographically and operationally separate" from mining operations – just as Dicaperl's plant – were under OSHA jurisdiction.[5] *Id.* at 734. The facility owner further maintained, in arguments similar to those advanced by Respondent, that continued inclusions of its plant under MSHA's jurisdiction, while similar perlite facilities were not under MSHA jurisdiction, was unreasonable, defying common sense. *Id.* at 724. The "bizarre result" was that a Dicaperl's facility was the

5. Unlike in the case *sub judice,* more extensive evidence regarding the location and number of similar plants, locally and nationally, was offered.

only such facility still under MSHA's jurisdiction, while its competitors were under OSHA jurisdiction. *Id.* at 735.

ALJ Manning initially overruled the Secretary's objections to the introduction of Dicaperl's evidence of MSHA's lack of enforcement at other perlite facilities as being irrelevant. *Id.* at 736. However, he ultimately concluded that MSHA's failure to inspect other perlite facilities was not relevant to the issue of whether the Secretary had the authority to enforce MSHA's standards at the operator's plant. *Id.* ALJ Manning observed that no perlite facility is exactly alike and it would be "quite cumbersome and impractical" for Commission judges, when considering whether a facility should be subject to MSHA jurisdiction, to evaluate whether MSHA should be exercising jurisdiction at similar facilities. *Id.* Essentially concluding that such matters called for case-by-case factual determinations, ALJ Manning held that too many factors come into play in a similar facility jurisdictional analysis. *Id.*

Just as no mine is exactly alike, and no perlite expansion operation is exactly alike, this Court believes no "bagging operation" is exactly alike. To have allowed Respondent's proposed similar facility evidence into the record would have required this Court to embark upon a jurisdictional safari, searching out all similar facilities in the country and comparing like and non-like activities, structures, operations, and products with that of the subject Carbon Plant. (The collateral inquiries would be endless – such as in the present controversy – where this Court would be required to determine why some bagging facilities chose to remain under MSHA jurisdiction.)

Given the clear navigational directions for finding jurisdiction set forth in pertinent portions of the Mine Act and MOU, without the need for such evidence, this Court granted the Secretary's motion *in limine* and rejected the Respondent's proposed similar facility evidence as being irrelevant and as creating unduly burdensome demands.[6]

This Court notes that Respondent was in no way prejudiced by this ruling because it still had the ability to present live and depositional testimony concerning the Carbon Plant's nature, purpose, and specific activities; photographic and documentary evidence in support of the foregoing; and expert witness testimony in support of the foregoing. Further, it could present evidence establishing or tending to prove that MSHA, in or about 2004 or thereafter, determined that the Carbon Plant should have been excluded from MSHA jurisdiction and any evidence showing that determination was conveyed to the Respondent.

FACTUAL BACKGROUND AND SUMMARY OF TESTIMONY

The Respondent operates a facility in Shamokin, Pennsylvania, that sells products consisting of anthracite coal that is unmixed, as well as anthracite coal that is blended with other carbonaceous materials. It further

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6. Further, if this court would have allowed Respondent's proposed evidence, as set forth in its offers of proof, it would have accorded such little probative value in light of this court's analysis of the law and assessment of evidence and witness credibility, as discussed *intra.*

manufactures a variety of carbon-based products for the steel, glass, rubber and plastics industries. Prior to hearing, the parties stipulated that the Respondent neither extracts, washes, cleans, or crushes coal in its Carbon Plant that is at issue nor does it own any mines or subsidiaries that perform these functions. Shortly after assuming ownership of Shamokin Filler Company, the new owners[7], Don and William Rosini, requested that MSHA determine that the Carbon Plant should properly be under the jurisdiction of OSHA, rather than MSHA.

The witnesses at hearing testified as follows:

Matthew Bierman: Bierman is a coal mine inspector for MSHA. Prior to his becoming an inspector, he worked for Jeddo Coal Company, a surface anthracite coal operation in Hazelton, Pennsylvania, where he was a foreman in the preparation plant which included doing some quality control work. He has a degree in Environmental Resource Management. Geology classes were required in obtaining this degree. He testified that no coal is one hundred percent coal; rather, the normal scale for anthracite coal is typically between eighty-seven and ninety-two percent (87-92%). (Tr. 44-45.)

As part of his employment as an inspector, he was required to administer three complete health and safety

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7. Though Respondent's description of the Rosini cousins as being new owners is technically accurate, they are in fact sons of the original Rosini owners, who were brother-partners and still are on Respondent's payroll. Shamokin Filler is a subchapter S corporation. (Tr. 385.)

inspections, or E01 inspections, at Respondent's Carbon Plant. These inspections involve approximately forty to fifty (40-50) hours on site. Although his last full inspection was in August 2009, he was sent to the Carbon Plant in October 2009 for the purposes of observing the flow of coal at the Carbon Plant and reporting back to his supervisors because the Respondent had challenged MSHA's jurisdiction over the facility. (Tr. 46-49.)

In his PowerPoint, Bierman first showed piles of coal, which he explains has already been washed and sized prior to arriving at the Carbon Plant. Second, explained that the feed hopper is what coal is put into before it proceeds by conveyor unit to the dryer. In the dryer, a heating unit blows hot air through a tube as it rotates. Because it is slightly sloped, the coal is dried as it moves down the tube. From here, the coal enters the screens. As the screen gyrates and circulates across the material, the oversized material is removed and the needed material falls through. He testified that the Carbon Plant has two different kinds of screens because they produce different products with the materials from the different screens. After screening, the Respondent's employees informed Bierman that the coal is then moved to storage bins until it is loaded or bagged. Bierman never made a formal inquiry to management whether this process was correct. (Tr. 49-53.)

Although he acknowledged that the facility also packaged and sold graphite pellets, this was not a primary concern of his inspections. This process was only important to him in that the inside dryer typically

used to dry graphite was sometimes used to dry coal when the outside dryer was not working. The inside feed hopper was used for coal at this time as well. Bierman further testified that the Respondent's facility includes a lab, where its products are inspected for quality control reasons. Here, the Respondent could ensure that the materials it produces meets the customer's specifications. (Tr. 54-60.)

Not only did employees tell Bierman that coal was being stored, but they also told him that they did not typically mix the coal with any other materials. Again, Bierman never confirmed this with management, nor did he test any of the bags of materials located on site. He did, however, testify that he saw hundreds of tons of coal at the facility while the existence of metallurgical and petroleum coke, which are not covered under the Mine Act, was much less prevalent. These measurements were adduced by estimation rather than scientific calculations. (Tr. 54, 62.)

John Petrulich: Petrulich was the former production manager at Respondent's Carbon Plant. In this position, he testified that his primary duties were the coordination of different orders to ensure that they were shipped on time, the control of the information flow as to what products were to be run by production, the training of lab technicians, the interviewing and hiring of some general laborers, and the revision and implementation of standard operating procedures. He was later terminated after an agreement. The reason for termination listed on his unemployment papers was "attitude." (Tr. 97, 99.)

In his role of training the lab technicians, Petrulich demonstrated how to check moisture content both after receiving the coal and after drying to ensure that the levels were acceptable. He also monitored the sulfur values and ash content of the coal. Because of these roles, he had to be familiar with the makeup of the Respondent's products. Knowing the specifications of the products was also important because individual customers needed materials at different specifications. Petrulich was not as familiar with the actual processing that occurred on site. (Tr. 97, 98, 100, 101.)

Petrulich also testified that coke was used more as an additive or filler. The coal, however, was not necessarily changed into something else because the coke was added to it. Rather, the coke was used as a cost effective weight increase and could have just as well have been alternative fillers, but the bulk of the bag content was ultimately coal. However, he later testified that there were several Carbon Plant products that contained no coal whatsoever. He also testified that due to the properties of most of the non-coal materials, it could not be mistaken for coal easily. His one caveat was that coal was often crushed into fine dust from the weight of the "supersacks,"[8] which could look like carbon black to an untrained eye. (Tr. 101-105.)

Next, Petrulich testified to emails that were sent both to customers concerning Respondent's products and among employees of the Carbon Plant as well as

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8. Supersacks are one-ton bags of coal or other products that are sold on the market.

the owners in the days leading up to a visit by MSHA, that will be explained in more detail *infra.* One string of emails demonstrates that a customer was questioning the specifics of one product and owner, William Rosini responded by writing that Shamokin B-593 is "100 percent anthracite coal and barley size." The other emails were concerned with the jurisdictional visit that members of MSHA were to conduct on July 28, 2009. The first email stated, "We need to convince [MSHA] that we blend many things together to make our products. Do we have piles of different types of carbon sitting around?" William Rosini replied that their were and each type should be jarred and labeled. When Petrulich asked if he was to retrieve, jar, and label each, William Rosini told him just to retrieve it and Rosini would label it himself. Later that day, William Rosini send an email saying "It's probably a horrible idea to be running straight coal when they come. Let's mix the met coke with it while there are there." The last string of emails were sent from Donald Rosini writing, "Even the mystery bank can be represented as a coke and graphite blend." William Rosini responded, "If need be we can demonstrate by cutting a sack of material on the pile." (Tr. 110-111, 113, 115-120.)

In explaining the purpose of the emails, Petrulich testified that the owners were attempting to "trick" MSHA into believing that its continued jurisdiction over the Carbon Plant was improper. The Respondent had never previously suggested putting graphite or coke into a pile of coal. Further, he stated that the coal and graphite were even separated on the mystery bank during the period of time that he worked there. Even under cross-

examination, he maintained that he had no belief that the owners were simply attempting to demonstrate the full range of their products and processes. But he did admit that he did not know whether any of the ideas spoken in the emails came to fruition. (Tr. 114, 121-22, 134-139, 141-142.)

Ronald Farrell: Farrell is a coal mine inspector for MSHA, who only inspects surface mines. Prior to working for MSHA, he worked at a coal processing plant and strip mine for nearly twenty-eight (28) years as a coal inspector, a second-shift supervisor, and a day-shift supervisor. He has only inspected the Respondent's Carbon Plant. He testified that during each E01 inspection, they must inspect the entire facility and at the date of this hearing, he had last been there in September 2010. During his inspections of the Carbon Plant, he observed employees "stockpiling [coal], picking it up, feeding it into a feed hopper, drying it, screening it, and loading it out for sale." He had only been to Respondent's Carbon Plant for the purposes of inspections, never to specifically monitor the flow of coal. (Tr. 162-164.)

During an inspection on March 8, 2010, Farrell asked an employee[9] to explain the Carbon Plant's processes. He described the process as follows: "Coal from several sources is fed to the dryer. Then up a bucket elevator, sized, then goes to the proper phase. They make three products, Barley, No. 5 and 20, all coal." He wrote this information down because his supervisor had accompanied

9. The employee's name was redacted for anonymity purposes.

him on the inspection and was unfamiliar with the Carbon Plant's processes. He did not sample or analyze the coal and recognizes that it may have been mixed with another carbonaceous product although the employee did not allude to that when he told Farrell about the process. He did not ask management about the correctness of this statement, and he did not ask the employee about the manufacturing processes that occur on other parts of the Respondent's property. (Tr. 168-169.)

Although Farrell was not part of the 2004 jurisdictional fact-finding committee specifically for the Respondent's Carbon Plant[10], he testified that he was aware that a discussion was held about the jurisdiction of the Respondent's Carbon Plant and it was later decided that no actual offer was to be made. This differed from his deposition testimony indicating that an offer had been made. He explained that he had assumed an offer had been made from conversations that he had overheard around the office. Later, though, other documents were produced, mainly written replies from two other facilities, to clarify that he had heard incorrectly. He could not state, however, whether the Carbon Plant was, in fact, given no offer to opt out of MSHA jurisdiction or whether the options given to these other two facilities were absolute options to move under OSHA jurisdiction. (Tr. 171-173.)

Farrell reviewed the report regarding the Carbon Plant and testified that the report was not a detailed

10. Farrell was a part of the fact-finding committee for other facilities.

description of the Respondent's activities. He also noted that it was much less detailed than the report that he completed for a different facility. It failed to mention the blending of non-mine materials with the coal and the existence of some products that were entirely non-mined materials. He further testified that Bierman's PowerPoint was not an accurate detailed description of the Carbon Plant because it too failed to acknowledge the existence of several materials and processes at the facility. (Tr. 184, 208-210, 216-218.)

Farrell conceded that MSHA does not have any specific safety standards that pertain to manufacturing, but he stated that he believed that the Respondent's products should be considered processed coal and under MSHA jurisdiction. In his deposition, he stated he would not consider a product that was forty percent (40%) coal to be a "mined product," but now that he understands what metallurgical coke is, his answer would be different. (Tr. 118, 223.)

Patrick Boylan: Boylan is currently the senior staff investigator and staff assistant with MSHA whose duties include accident coordination, peer review coordination, and 110 investigations under the Act. He was previously a conference and litigation representative in District 1, a promotion from an underground mine inspector. He began his mining career at the Reading Anthracite Coal Company breaker, or custom coal preparation plant, where he worked for twenty (20) years. He has been to Respondent's Carbon Plant and last inspected it in 2004. (Tr. 233-236.)

Boylan spoke to and obtained a declaration from Ricky Rollins, the manager of Steel Dynamics, indicating the company purchased about 4,300 tons of Shamokin 585 from the Respondent, who advertised that the product was one hundred percent (100%) coal and not a mixture. Boylan did not know, and made no assertion that, Rollins checked the ash and sulfur content to ensure that the product was completely anthracite coal. Further, he acknowledges that there really is no such product as one hundred percent (100%) anthracite coal from a technical standpoint. (Tr. 246-249.)

In 2004, Boylan was part of the fact-finding committee. He, however, did not know whether a jurisdictional determination concerning Respondent's Carbon Plant had been made. He acknowledged that the Respondent does not extract coal and is not affiliated with any mines that do. He also acknowledged that the Respondent is actually a customer of preparation plants and breakers in District 1. (Tr. 251, 255-257.)

Thomas Yencho: Yencho is the field office supervisor for MSHA in Shamokin, Pennsylvania. In his position, he leads inspectors in their inspection of approximately 120 surface mines, roughly half of which are strip mines and the other half are facilities. He does field activity reviews and company activities every six months with each inspector. He must personally visit every mine at least once annually. Prior to his position with MSHA, he worked for Jeddo Highland Coal Company for fourteen (14) years and for Reading Anthracite Coal Company for ten (10) years. He has never worked at a coal preparation

plant, nor has he ever inspected the Respondent's facility. (Tr. 258-260.)

Yencho became the field office supervisor in 2004. He discovered the Respondent's intention to challenge MSHA jurisdiction from the District[11] in 2009. During this call, he also learned that they were to visit the site to conduct fact-finding; he testified that in preparation for this visit, he asked Bierman to create a PowerPoint concerning the flow of coal at the facility. Rather than have Bierman make a special visit to the facility to obtain the information, he had him create it from memory as a way to inform the solicitors when they arrived for the jurisdictional visit. (Tr. 260-261.)

During the visit, Yencho testified that they met in the mining office where nine or ten vials of coal and non-coal materials were demonstrated. The company informed them of what was in some of the vials but refused, for proprietary reasons to explain the makeup of others. Then, they toured the stockpiles, where Yencho testified that he saw No. 4 and No. 5 coal, as well as graphite, and possibly metallurgical or petroleum coke. Next, they toured the inside of the building and finished by looking at the outside dryer and the area where the materials are bagged. He testified that while they were at the facility, he believed that they were processing either No. 4 or No. 5 coal and he did not see any mixing activities being conducted. The owners mostly talked about mixing

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11. Although it was not further clarified at hearing, it is assumed that this refers to District 1.

activities as they approached the graphite pellet mill, but did talk about mixing coal with the non-coal materials as well. (Tr. 262-263, 322-323.)

While accompanying inspectors in previous inspections, Yencho observed coal being loaded in the hopper of the top dryer. He admitted, however, that he did not "stand there and observe [the employee] for hours and hours and hours." In his opinion, he testified that the Respondent's drying and screening of coal would place them under the jurisdiction of MSHA. (Tr. 264-265.)

Yencho also testified that no offer was made to the Respondent following the fact-finding committee's jurisdictional determinations in 2004. This contradicted his past deposition testimony that he had personally went to the Respondent and made an offer. However, upon checking his time and activity records for the time in question, he discovered that he was at the Mine Academy. Further, he testified that no "offer" was made. He explained that he had no authority to make an offer and that he was trying to clear that up in the second day of his deposition by explaining that the letter writing process would have to be followed and that "offer" was a poor choice of words. (Tr. 266-268, 274, 280, 283, 290.)

When asked about the lack of detail in the Respondent's report prepared by inspectors Kathleen Radzavicz and Joe Fisher, Yencho testified that he trusted what they had prepared. He explained that they may not have seen any of the Respondent's non-coal-related manufacturing activities, and therefore, could not have documented them

in their report. He also testified that the reports were then sent to the District, but he did not know their fate from that point forward. He could only assume that they were given consideration. (Tr. 296, 334, 353.)

William Sparvieri: Sparvieri was the former assistant district manager for MSHA in District 1. Also, briefly in 2004, approximately two or three months, he was the acting district manager in that District. When the issue of jurisdiction first arose in 2004, he organized the fact finding committee to visit each operator and determine what activities were taking place. At the time that the. committee was established, no decision had been made as to whether MSHA should be exercising jurisdiction over other facilities, nor did Sparvieri have the authority to release the Respondent, or any other facility, from MSHA jurisdiction. (Tr. 368-369.)

Although Sparvieri did not visit the Carbon Plant with the fact finding committee, the result of the facts gathered were that it met the criteria of being classified as a mine. He admitted that the report does not reflect any of the manufacturing activities that take place on the premises; however, he said that this would have no reflection on the issue of jurisdiction because of the amount of activities performed that fall under the Act. This result was then sent to the district manager, but, as far as Sparvieri knows, was never forwarded to the Office of the Solicitor or the MSHA administration office. Neither his signature nor Yencho's appear on the report for the Carbon Plant. (Tr. 370, 373-374.)

When questioned why different inspectors were sent to Keystone Filler Company[12] than the Carbon Plant, Sparvieri explained that time constraints forced them to add inspectors to the fact-finding committee. Boylan and Farrell were not originally part of the fact finding committee, but had to later be added. Radzavicz and Fisher were the two inspectors who were assigned to visit all of the facilities when the fact-finding committee began its jurisdictional inquiry. (Tr. 376.)

Donald Rosini: Donald Rosini is the owner and president of Respondent with fifty percent (50%) ownership. The Carbon Plant was previously under the ownership of his father and uncle. Donald Rosini attended the University of Pennsylvania and received his Bachelor's degree in economics from the Wharton School where he double majored in finance and management. After school, he traded derivatives in Philadelphia for Susquehanna International Group and later traded currency derivatives in Tokyo, Japan for ten years with Chase Manhattan Bank and Bank of New York. At the time of the financial meltdown in 2008, he was trading bonds back in Philadelphia for Susquehanna. At that time, he returned home and joined the Respondent. (Tr. 381-383.)

Prior to becoming a derivative trader, Donald Rosini testified that he had never actually worked for

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12. Keystone Filler Company was released from MSHA jurisdiction in 2004, after the fact-finding committee concluded that it would more appropriately be under OSHA jurisdiction and, based on the committee's report, either MSHA administration or the Office of the Solicitor, in fact, released them from MSHA jurisdiction.

the Respondent, but he would assist his father in doing financial projections and engage in discussions about the business in an unpaid capacity. Now, neither his father nor his uncle are active in the management of the business, but Donald Rosini explained that they are still on the payroll as consultants and that he and his cousin talk to the former owners everyday or nearly everyday. (Tr. 383.)

Under the former ownership, both men were active in all aspects of the company. Under this ownership, Donald Rosini testified that there is somewhat more of a division of labor. He describes himself as the Chief Financial Officer (CFO). He looks at the company's assets and resources and attempts to determine how they can most efficiently be employed. He further engages in financial projections to determine which processes need to be carried out more efficiently and in what direction the company should further go. William Rosini, his cousin and co-owner, was more active in the production specifications of each product and the sale of the finished product. (Tr. 384.)

Donald Rosini testified that, in early 2009, he decided to challenge MSHA jurisdiction. He said that decision was made based upon projections for the future of their company. He testified that they are expanding and the processes now being employed focus much more on the manufacturing of items, such as graphite paint, than the activities that are found under the Act. Because of these changes, he proffered that OSHA seemed to be the more appropriate jurisdiction. As evidence of this, he testified that there are no risks of silicosis and there are no steep grades at the facility, which are two issues that MSHA

works with quite a bit. Further, his employees complain that MSHA training seems like a waste of time to them because many of the issues are irrelevant to the Carbon Plant. When asked if he talked to his father prior to the jurisdictional challenge, he testified that he had spoken to him and his father said that he had been afraid of MSHA retaliation if he challenged its jurisdiction. (Tr. 386-388.)

Leading up to the Respondent's jurisdictional challenge, Donald Rosini talked to a number of people, including individuals at Keystone Filler and Kimmel. From these discussions, be was referred to the lawyer who wrote to MSHA for both requesting a release from jurisdiction. Donald Rosini testified that the letter was written and a meeting was to be arranged. However, MSHA was unable to produce a copy of the letter from its records and the Respondent claimed that it never received a copy of the letter for which it paid. Under cross-examination, he admitted that he does not ever remember seeing the letter at all and, in fact, he is relying on a confirmation email sent from the attorney stating that the challenge letter had been sent. Respondent was presented with a letter from its present counsel explaining that the request for jurisdiction transfer had been denied. The denial was based upon the number of activities that constituted activities under the Act. (Tr. 389-390, 394-395, 479.)

When describing the products offered by the Respondent, Donald Rosini testified that approximately twenty percent (20%) are straight coal, seventy percent (70%) are a coal blend, and the remaining ten percent

(10%) are comprised entirely of non-mined materials. He further stated that their product list is constantly in flux because William Rosini is constantly making up new products depending on the specifications needed by the customers. In response to the testimony that MSHA employees had never seen coal being blended in the dryers, Donald Rosini said that he was certain that they had seen it but were completely unaware of it; although, he opined that they should have realized that blending was taking place. (Tr. 408, 412-413, 416-417.)

In response to Petrulich's interpretation of the emails prior to the MSHA business, Donald Rosini testified that the Respondent was attempting to give MSHA the complete view of its business activities. The labeling of the vials was done to ensure that the visitors would get the full scope of the blending activities. He did not address the suspect wording of the email. When asked about the email that he sent suggesting that they could cut a sack of material on the mystery bank, he testified that he did not know his intention of the email and that no action was taken on the suggestion. (Tr. 435-437, 441.)

Under cross-examination, Donald Rosini admitted that he had never heard of the offer to opt out of MSHA jurisdiction until the deposition of Yencho. It was at this time that he asked his father about it. William Rosini's father also said that no offer had been made to them when asked. He also acknowledged that while he felt that the Carbon Plant was being retaliated against for its challenging jurisdiction, he had no knowledge that fine amounts had risen, in general, by the passage of the Miner Act. (Tr. 447-448, 469.)

David Pfleegor: Pfleegor is the president of Keystone Filler and Manufacturing Company in Muncy, Pennsylvania, which is a competitor of the Respondent's Carbon Plant. He testified that it processes carbon into mineral fillers and carbon products for the steel industry. These products are essentially the same as those produced by the Respondent. (Tr. 484-485.)

Pfleegor testified that, in 2004, inspector Paul Sargent came to the plant to alert them that they were no longer going to be under MSHA jurisdiction. This inspector also said that they would be releasing "the rest of the companies, Shamokin Filler, Leopold, and named numerous companies that they were probably going to have to release." He said that the inspector explained that the Respondent would be released because it was the same type of operation as Keystone and Keystone had just been released. However, Pfleegor admitted that he had no idea whether Sargent had any authority to make these types of jurisdictional decisions or whether he was just assuming. Further, he backed off of his certain testimony by saying that Sargent said the other facilities were "probably going to be released." (Tr. 486-488.)

Kathleen Radzavicz: Radzavicz is a conference and litigation representative for MSHA, District 1, Coal, in the Wilkes-Barre office. Prior to this role, she was a coal mine inspector health specialist, but has never actually worked in a mine. She was chosen as part of the fact finding committee because she handles all problems dealing with repeat test sampling because of testing disclosures. Along with Joe Fisher, she was assigned by Sparvieri to visit

the Respondent's Carbon Plant and write the fact-finding committee report. Although she was not present during the visit to Keystone, she compiled the information and wrote the report for that facility as well. (Tr. 495-497, 499, 501.)

The report on the Carbon Plant was to be written to detail the on-site processes, specifically focusing on the flow of coal. Although graphite was mentioned in the report written, none of the other materials on-site were mentioned; there was also no mention of other processes that occur on-site. She said that she did not see any other processes being conducted while she was at the facility. Radzavicz testified that she realized that the report was less detailed. She admitted that she did not take any samples at the Carbon Plant. But she also testified that she did not know that samples had been taken at Keystone until she wrote the report, after her jurisdiction visit to the Carbon Plant. During her visit to the Carbon Plant, she was given the impression that the Respondent was a custom coal preparation facility. Further, the Respondent's owners would not give permission for the inspectors to take pictures of the facility. (Tr. 497, 500-502, 509-510.)

Radzavicz testified that she did not know what happened to the report after she gave it to her supervisor, Jack Kuzar. She was never given feedback on the report and did not know what the ultimate purpose behind the report was. She testified that she realized that the jurisdictional visit was conducted in response to Keystone's jurisdictional challenge, but she was only told to observe the day-to-day operation at the Carbon Plant

with particular interest in the coal flow. No one at the Carbon Plant told her that coal was being mixed with other materials while she was conducting the visit, even though she testified that she spoken to someone in management. (Tr. 512-514, 518, 521.)

William Rosini: William Rosini is Respondent's owner, along with Donald Rosini, chairman, and secretary/ treasurer. He owns twenty-five percent (25%) of the company, but speaks for his sister's twenty-five percent (25%) as well. He attended Bloomberg University and received degrees in psychology and sociology with a minor in business, but he testified that he has worked for the Respondent nearly all of his life. (Tr. 523.)

William Rosini testified to the nature of the business by saying, "We manufacture all types of carbons. It involves getting materials from across the United States, is mostly what I do, trying to find scrap products, find anthracite coal, petroleum coke, metallurgical coke. We buy some carbon black. We do a number of things with it, mostly drying and – we do whatever the customer actually wants, to be honest with you." He then testified that the company is engaged in the same activities that it was thirty (30) years ago, with no substantial changes in equipment, products, or customers. The Respondent does not have a mine permit in the state of Pennsylvania. (Tr. 524-526.)

William Rosini further testified that he spoke with Ricky Rollins, who gave the signed statement to Boylan that the Shamokin 5 85 was 100% anthracite coal. He said that Rollins avoided phone calls four or five times and then

eventually just signed the prepared statement. Also, he said that Rollins was aware that the products were not really 100% anthracite coal from the conversations they had, both prior to and after the email. As far as Petrulich was concerned, although he was hired as a lab technician to perform quality control, William Rosini dismissed his position as basically a gofer, who was there more or less for employee morale. He testified that Petrulich was not a production manager and would not have directed the product formulation, because he did not have access to the customer specifications. (Tr. 530-532, 534, 536-537.)

In explaining the emails before the MSHA visit, William Rosini testified that Donald Rosini had not been at the stockpiles for a while and wanted to make sure that all of the materials used in the products were accurately presented. William Rosini asserted that Donald Rosini was not attempting to misrepresent the facility or trying to trick MSHA inspectors. William Rosini said that his intent with email stating that he would label all the materials was written because he did not believe that anyone else would do what he was asking. He explained that he did not want to be running straight coal because he knew that MSHA was under the impression that they were a mine, but that they ended up running straight coal that day anyway, so the email was pointless. Further, he explained that the email calling for the possible cutting of a bag of material on the mystery bank because he wanted to demonstrate they really do mix metallurgical coke with anthracite coal on a regular basis. Finally, he explained the email representing Shamokin B-593 as 100% anthracite coal as either "sales" speak or a typographical error. (Tr. 539-540, 543-545, 547-548, 551, 571.)

Under cross-examination, William Rosini admitted that many of the carbonaceous products they have listed on-site are not mixed with the anthracite coal unless there is a specific need for it. He also said that metallurgical coke and coal are the only two materials stockpiled at the top of the facility at this time. Further, these are the two materials that are most frequently mixed. When asked on direct examination about some other materials, limestone, glycerine, etc., William Rosini testified that they were kept at the facility and used. However, under cross-examination, he admitted that their use was fairly rare and only for particular purposes. When asked about a 5/16th inch screen, he said that the facility does not have this size screen now and that he had never heard his father talk about one, but he was not sure if that sized screen was at the facility before he started working there. He did say that he would not have been sure what use his father and uncle would have had for it. (Tr. 541-543, 550, 558, 563-566, 582-583.)

Lawrence Gazdick: Gazdick was a maintenance foreman with Jeddo Highland Coal Company for fourteen years. For the next eight years, he designed, built, and operated preparation plants for the same Company. He later worked for Pennsylvania Power & Light Company where he was a design draftsman and his specialty was preparation of coal to feed the generating stations and generating station design. In 1991, he was hired as a surface inspector for MSHA. Over his sixteen years of experience in MSHA he was promoted to underground inspector, surface specialist, and eventually to the position of supervisor of underground mines at the Pottsville field office. At one

point, he held. the position of senior special investigator, staff assistant to the district manager in District 1, who was Jack Kuzar. Gazdick is currently working as a consultant to coal industry. (Tr. 586-589.)

During his time as senior special investigator, the fact finding committee to determine the jurisdiction of the bagging facilities was assembled. Gazdick testified that the Respondent was under the scrutiny of the fact finding committee and, further, he had been to the Carbon Plant both in his capacity as an inspector and as an assistant to Jack Kuzar in performing "walk and talk" safety talks at the facility. He also observed the facility prior to writing his expert report. He testified that the facility looks exactly as it did when he inspected for the first time. The equipment and operations were identical to 2004. (Tr. 589, 594, 596-597.)

He testified that, in his experience the Respondent's Carbon Plant is not similar to the coal preparation plants that he has worked for and designed in the past. The Respondent has no equivalent operation to those that would process extracted coal. They do not deal in several sizes of coal and they do not wash it. They also have no equipment on site allowing them to change the size or the quality of the coal like a normal breaker would. They can only buy coal that has already been prepared by another facility. (Tr. 589.)

He testified that the Respondent does screen the coal as it enters the dryer. This is to prevent damage to the equipment by pieces of coal that are too large. He said that

this quarter-inch screening could be considered incidental to jurisdiction under the Act. He further testified that the drying, storing, and loading of coal can also be considered incidental to jurisdiction. He was concerned that the PowerPoint by Bierman mentioned media filter, which is a process that is covered under the Act and could have erroneously caused members of the fact finding committee to conclude that the Carbon Plant should be retained under MSHA jurisdiction. In his expert opinion, the Plant should be under OSHA jurisdiction because the regulation under OSHA are a better fit for this type of facility and would enhance the safety and training of its employees. (Tr. 603-607, 610.)

Under cross-examination, Gazdick admitted that the Act does cover custom coal facilities, but he testified that coal is only one of many products that they used. However, he acknowledged that it would also depend upon the processes that follow as well. He did not take any samples of the products at the Carbon Plant. Although Gazdick recognizes that the Respondent's process does involve "changing the moisture content of the coal," he does not refer to that process as drying. Further, he did not know of any case law, provision in the MOU, or program policy letters that concluded that bagging facilities should not be covered under MSHA, even if they are just bagging materials. Finally, he admitted that he is currently involved in the litigation an EEO complaint that he filed against MSHA and is appealing in federal District Court after an administrative law judge ruled against him. (Tr. 627, 632-633, 636-637, 639-640.)

ISSUES

The general issue before this Court is whether Respondent's Carbon Plant facility is subject to MSHA jurisdiction based on whether the Carbon Plant was/is a "coal or other mine" within the meaning of Section 3(h)(1)(c) of the Mine Act, and/or whether the Carbon Plant had engaged/is engaging in the "work of preparing the coal" within the meaning of Section 3(h)(2)(i) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Alleged past MSHA jurisdictional determination

Before addressing the specific jurisdictional questions of whether the Carbon Plant constitutes a "coal or other mine" and/or whether it is engaging in the "work of preparing coal," this Court will address the evidentiary/factual issue of whether MSHA had in fact determined the Carbon Plant should be given the option to go under OSHA and/or had conveyed such to Respondent.

Respondent has variously argued that such a jurisdictional determination had taken place, that such a determination should be afforded deference, and that MSHA/the Secretary's failure to effectuate said determination constituted arbitrary and capricious conduct. This Court accepts – as a general proposition – that a past MSHA "determination" would be a legitimate consideration in deciding a facility's jurisdictional status. However, this Court finds it unnecessary to address any of Respondent's associated legal arguments in that such are

posited upon a critical factual assumption – that MSHA had in fact previously determined that it should no longer exercise jurisdiction over the Carbon Plant. After careful review of the record, including an assessment of witness credibility, this Court finds that Respondent has failed to carry its burden of proof as to this factual claim.

It is uncontroverted that MSHA had exercised jurisdiction over the Carbon Plant for decades, and indeed, for generations of Rosini ownership. (Ex. G-7.) At hearing, the Secretary maintained that no specific determinations had ever been made that the Carbon Plant should be excluded from MSHA jurisdiction, nor had any offer to opt out of MSHA jurisdiction ever been extended to Respondent. (Tr. 39-40.) No written proof was offered by Respondent to support its contention.[13] The evidence presented by Respondent at hearing was sparse and contradictory. Neither of the previous owners were called to testify, nor were written statements or depositions by such offered into evidence. Given Donald Rosini's testimony that the prior owners were still on the payroll, were still consultants, and still continued to discuss the "business [...] everyday" (Tr. at 383.), the Respondent's failure to produce the past owners at hearing is puzzling to this Court. (See, however, *infra* one possible explanation for Respondent's failure.)

At hearing Thomas Yencho, the field office supervisor

13. As announced by this Court at hearing, an *in camera* review of the memoranda that was subject of Respondent's motion to compel contained no specific reference to the Carbon Plant (See Tr. at 24-25).

for MSHA in Shamokin, Pennsylvania, testified that no offers to leave MSHA jurisdiction had ever been made to Respondent in 2004. (Tr. 265-267.) Yencho explained that he had been incorrect in past recollections at a prior deposition. After reflection and after review of his "T and A" records, Yencho concluded that he could not have gone to Respondent's facility to make such an offer during the time in question. Further, he would not have had in any case the authority to do so. (Tr. 268-280.)

Despite the Respondent's vigorous cross-examination, alleged discovery surprise and attempted impeachment of Yencho, this Court found Yencho credible. *Inter alia,* this Court reached its credibility assessment in considering the testimony of one of Respondent's principal witnesses, Donald Rosini. When questioned as to whether either of the prior owners, the senior Rosini brothers, had reported that such a critical jurisdictional offer ever was made, Donald Rosini admitted that both said it "never happened." (Tr. 447-448.) Thus, both senior owners' recollections contradicted the assertions of Respondent and support and corroborate Yencho's hearing testimony.

Further at hearing, Donald Rosini raised for the first time an assertion that prior owners had failed to challenge jurisdiction in the past due to fears of retaliation by MSHA (Tr. at 387-388). This Court finds no credible evidence in the record supporting such an allegation. That MSHA employees would somehow become personally enraged over Respondent's questioning of its jurisdiction

status strains this Court's credulity.[14] Mr. Rosini's further assertion that an increase in citations after the Respondent's jurisdictional challenge was proof of MSHA's *animus* is rejected by this Court as a fallacious "*post ergo propter hoc*" (after this, therefore because of this) proposition.

As agreed by the parties, the validity of the underlying citations/contests/penalty petitions would not be considered by this Court at this time. Without a full hearing regarding such, this Court cannot assign sinister motivations to MSHA based upon a general bald accusation of malevolence.

Respondent's reliance upon the speculations of Ronald Farrell as to the import of conversations on which he had eavesdropped to prove its factual contention calls for this Court to essentially speculate on speculation.

The proof presented by Respondent is simply too thin a layer of evidentiary ice for this Court to base a finding of fact. Therefore, this Court, as trier-of-fact, finds that the Respondent failed to establish that any specific jurisdictional determination was ever made by MSHA or offer to opt out of MSHA ever conveyed to the Respondent.

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14. Donald Rosini's testimony was further undermined by the Respondent's failure to produce a copy of a letter contesting jurisdiction allegedly written by counsel retained by the Respondent. That Mr. Rosini, a Wharton school graduate and owner and president of Shamokin Filler Company, did not have even a copy of a letter for which an attorney charged $7,500 likewise strains credulity (Tr. 389-390).

II. Jurisdictional Analysis

The Respondent maintains that the Carbon Plant is a "sophisticated manufacturer of carbon products" that properly should be under OSHA jurisdiction. The Secretary, however, maintains that the Carbon Plant may reasonably be construed as a "custom coal preparation facility" within the meaning of the Mine Act.

This Court notes that when Congress passed the Mine Act, the report of the Senate committee on Human Resources stated that "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act shall be give the broadest possible interpretation and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." *(S. Rep. No. 95-181* at 14 (1977, reprinted in *Senate subcomm. On Labor, comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978))(emphasis added). Thus, any jurisdiction search must use this Congressional mandate as its north star.

A further navigational aid in finding jurisdiction is the Interagency Agreement between the Mine Safety and Health Administrative, U.S. Department of Labor and the Occupational Safety and Health Administration, U.S. Department of Labor (March 29, 1979). Like the Mine Act, this agreement is inclusive rather than exclusive in considering MSHA's jurisdiction, again providing that doubts regarding MSHA/OSHA jurisdiction be resolved in favor of Mine Act coverage. (See MOU at § A.3, Authority

and Principle and § B.5, Clarification of Authority; see also *Nelson Quarries Inc.,* 2010 WL 4362432 FMSHRC (Oct. 2010) (ALJ)).

Given the "broadest possible interpretation" to what constitutes "a coal or other mine" and what constitutes "work of preparing coal" and the Congressional and interagency directives to resolve doubts in favor of Mine Act coverage, this Court is constrained to find that the Carbon Plant falls within the "sweeping" definition of a mine engaged in the work of preparing coal, and thus, should remain subject to MSHA jurisdiction. (*See also Secretary of Labor v. Sturdt's Ferry Preparation Company,* 602 F.2d 589, 592 (July 1979)).

This Court also reaches this decision despite factually accepting that the Carbon Plant uses non-mined materials in some of its operations and recognizing that "every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)." *Secretary of Labor v. Carolina Stalite Company,* 734 F.2d 1547, 1551 (May 1984). Further, the Court agrees with the Secretary's position that the testified-to activities at the Carbon Plant fall within the ambit of "preparing the coal," though again recognizing that the nature of the activities performed at the plant must be considered along with the activities listed in section 3(h)(2)(i) of the Act. *(See also Mineral Coal Sales, Inc.,* 7 FMSHRC 615, 619 (May 1985)). This Court specifically finds that the Secretary, by a preponderance of the evidence, proved that such activities as storing, loading, sizing ,and drying of (anthracite) coal took place

at Respondent's facility and that the overall purpose of Respondent's operation was that of a custom (coal) preparation facility as broadly defined in section 3 of the Act.

At hearing, Inspector Bierman testified that the anthracite coal was delivered and stored in a "lay down" area on the north side of the Carbon Plant. (Tr. 49, Ex. 2.) The coal was prepared by being placed in a feed hopper and then dried in the outdoor rotary dryer. The coal was then screened to remove over-sized pieces. (Tr. 49-51, 164, Ex. 2.) Following this preparation, coal is stored at the Carbon Plant. (Tr. *51*, Ex. 2.) Coal is then bagged, loaded, and shipped for bulk sale in trucks and rail cars. (Tr. 52-53, Ex. 2.) Ronald Farrell testified that he had inspected the Carbon Plant in March 2010, and had questioned a miner regarding the operation of an outside dryer. Reading from his notes taken at the scene, Inspector Farrell indicated that, according to the miner, coal from several sources was fed to the dryer, then up a bucket elevator, sized, then went "to the proper phase." All the products made were coal. (Tr. 168-169.) At hearing Thomas Yencho testified that while at the Carbon Plant, he observed a bucket of coal being placed into the hopper of the top dryer. (Tr. 264.)

Despite qualifications, both Donald and William Rosini essentially conceded that drying took place at the Carbon Plant. (See Tr. 403 (Donald Rosini described the operation of the rotary dryer); See Tr. 521 (William Rosini stated "we do a number of things . . . mostly drying and we do whatever the customer actually wants.")). Although Respondent's own expert also conceded the Carbon Plant

"lowered" or "changed" the moisture contest of coal (Tr. 616, 637), his contentions that such an activity did not constitute drying were found by this Court not to be credible. It is uncontroverted that the Carbon Plant loads stored coal. This Court accepts Respondent's arguments that many facilities – hospitals, schools, steel mills, railroads and shipyards, foundries, private residences – store and load coal and would not reasonably be subject to MSHA. However, the nature of operations at such medical, educational, transportation, and residential facilities, is markedly different from that of the Carbon Plant.

Much of Respondent's case, whether by pleading, testimony, cross-examination, argument or brief, has been directed to establishing that the Carbon Plant also utilizes non-mined materials and engages in manufacturing processes involving chemicals or non-coal carbons. This argument, however, misses the critical jurisdictional point of whether those substantial plant activities that do involve anthracite coal arguably bring the Carbon Plant within MSHA jurisdiction.[15]

The record *in toto* clearly establishes that a substantial portion of the material used by Respondent was anthracite

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15. This is especially so given, *inter alia,* the Congressional concern as enunciated in section 2 of the Act that "the first priority and concern of all in the coal or other mine industry must be the health and safety of its most precious resource – the miner" and given the clear Congressional mandate and interagency agreement directive for MSHA inclusion.

coal.[16] The record further clearly reveals that Respondent engaged in activities whose nature and function arguably constituted the work of preparing the coal.

This Court specifically rejects the proposition that a claim of jurisdiction should be solely based upon the amount of coal used.[17] Further, this Court has found no case or statutory law that mandates the exercise of MSHA or OSHA jurisdiction purely based upon the percentage of mined or non-mined materials used or, indeed, based upon the percentage of manufacturing versus mining activities at a facility. However, this Court is persuaded that the extensive use of coal at a facility and the number and volume of coal-related activities would be legitimate factors in determining Mine Act coverage. Further, to the extent that Respondent has suggested that Carbon Plant's operations only involve a *de minimis* use of anthracite coal or *de minimis* involvement of coal-related activities, this Court rejects such as being belied by the record *in toto.*

This Court agrees with Respondent that a "*per se*" analysis should not be utilized in determining jurisdiction, but rather a "functional" analysis. (A functional analysis is one that determines whether the Mine Act covers a facility based upon the nature of the functions at the facility. *RNS Services, Inc. v. FMSHRC,* 115 F.3d 182, 184 (3d Cir. 1977). However, in applying a functional analysis to the subject

16. The credibility of the Respondent's assertions otherwise will be discussed *infra.*

17. See Respondent's argument at footnote 9 of its posthearing brief that MSHA implicitly suggests such.

facility, this Court finds that the Carbon Plant is a custom coal preparation facility that stores, sizes, dries and loads coal to make it suitable for subsequent industrial use.

The Carbon Plant's operation/activities, as argued by the Secretary, closely resemble that of facilities found to be under MSHA jurisdiction. *See inter alia: Alexander Bros., Inc.,* 4 FMSHRC 541 (1981) in which the Commission sustained Mine Act coverage over a coal reclamation facility; *Air Products & Chemicals, Inc.,* 15 FMSHRC 2428 (Dec. 1993) *aff'd* 37 F.3d 1487 (3d Cir. 1994) where the Commission found that the Mine Act covered the further preparation of coal refuse at a cogeneration plant before being used as fuel at the plant; *RNS Services,* 115 F.3d 188 (3d Cir. 1994) affirming *Air Products.* This Court further accepts as reasonable the Secretary's view that screening of coal at the Carbon Plant is a form of "sizing." *(See, i.e.,* Tr. 76-77 for Inspector Bierman testimony regarding such; *see also* Bureau of Mines, U.S. Dept. of Interior, <u>A Dictionary of Mining, Mineral and Related Terms</u>, 226, 976, noting that "screening" may be used as a synonym for "sizing.")

As to witness credibility and this Court's duty to assess such, this Court found the Respondent's chief witnesses to have offered contradictory, inconsistent, and suspect testimony. The Court specifically finds that there has been an attempt by the owners to obstruct the amount of coal used by the Carbon Plant, the percentage of coal versus non-mined materials, and the actual nature and extent of its coal versus non-coal operations.

At hearing, Donald Rosini testified that anthracite coal comprised only 20% of the products prepared at the Carbon Plant and that 70% of Respondent's products were some form of a coal and non-coal mixture. (Tr. 408.) However, an examination of the Shamokin Product Table (Ex. J-2) reveals that the tonnage of anthracite coal, in terms of actual product sold, was much higher than 20%. For example, over 6,000 tons of Respondent's product, "carb-o-cite," made of 100% anthracite coal, was sold in 2009, as compared to only a few tons of multiple products containing no coal or coal mixtures. On cross-examination, William Rosini expressed surprise regarding the "significantly higher" amounts of coal product versus non-coal product purchased in 2009, asserting such as "atypical." (Tr. 554-556.)

Emails from Respondent to customers also indicate higher percentages of anthracite coal usage than testified to. At hearing, the Secretary also presented a sworn declaration under penalty of perjury from another customer of Respondent, Rocky Rollins, who indicated that the Shamokin 585 product used in 2009 and 2010 was 100% anthracite coal (Ex. G-1) which, again, conflicted with the product mixture indicated by Shamokin in its product table. (Ex. J-2.)[18] William Rosini's attempts to explain away this discrepancy were found by this Court to be unpersuasive. (see *inter alia* Tr. 531-535.)

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18. This hearsay statement standing alone would be assigned little weight by this Court. But, when considered in the context of the other evidence of record, discussed *intra,* indicating attempts by Respondent to conceal the true nature of its operations, said statement supported this Court's findings of lack of Respondent's credibility.

At hearing, Donald Rosini gave equivocal testimony as to his actual knowledge of the Carbon Plant's operations since 2004. At one point he stated that he did not know if there had been any changes in customer base, what customers were demanding, and the ratio of straight coal to blended and non-coal product at the Carbon Plant. (Tr. 411.) He further testified that he had not spoken with his father in detail about the plant's products. (Tr. 424.) On the other hand, he asserted that MSHA had painted a distorted picture of the plant's products/operations. (Tr. 424-425.)

This Court noted that neither inspector Bierman or Farrell observed any mixing of coal with non-coal materials at the plant, such testimony being supported by the plant production reports which William Rosini alleged "surprise" over. The only bid sheets Respondent provided for it sales were for anthracite coal. (Tr. 567-568, Ex. G-5.) The Respondent's emails in anticipation of an MSHA inspection, again, can reasonably be construed as attempts to obfuscate the facility's actual operations.

This Court found William Rosini's descriptions of Respondent's past production manager as a "gofer," whose work primarily involved boosting morale on second shift to be unconvincing. This Court also found the Respondent's expert witness, Lawrence Gazdick, to be an unreliable, uninformed, and uncredible witness.[19]

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19. Although this Court did deny the Secretary's motion to exclude the expert witness testimony of Mr. Gazdick, this Court did find some merit in the Secretary's argument that Gazdick's testimony should be barred to the extent he sought to opine on

For example, Gazdick opined that the Occupational Safety and Health Act was better able to ensure the safety of Carbon Plant's employees than the Mine Act. However, on cross-examination, Gazdick conceded he did not know what OSHA guidelines and training were. (Tr. 638-639.)

Contrary to Respondent's arguments, the Carbon Plant's operation meets the definition of work of preparing the coal – a process usually performed by coal preparation facilities to make coal suitable for a particular use or to meet market specifications. *Oliver M. Elam, Jr., Company,* 4 FMSHRC 5, 8 (Jan. 1982). This Court essentially agrees with the rationale of the Government contained in exhibit G-7 that Carbon Plant is a surface facility processing coal to customer's specifications and for particular uses which meet the functional requirement of section 3(i) and the Elam analysis. *See also* Commission's statement at 4 FMSHRC 5, 7 (1982): "[A]s used in section 3(h) and as defined in section 3(i), "work of preparing coal" connotes **a process**, usually performed by the mine operator engaged in the extraction of the coal or by **custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications**. [emphasis supplied]"

This Court further accepts the Secretary's position that the activities at the Carbon Plant can properly and reasonably be interpreted as "milling" pursuant to Interagency Agreement provisions and pertinent case law.

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the ultimate issue of jurisdiction. (*See also* Secretary's Motion *in Limine* to Exclude Expert Witness Testimony.)

See In re Kaiser Aluminum and Chemical Co., 214 F.3d 586, 591 (5th Cir. 2000) (Congress expressly delegates to the Secretary . . . authority to determine what constitutes mineral milling). Indeed to the extent that there is any ambiguity or silence in the Mine Act and MOU terms discussed *intra,* this Court has found the Secretary's interpretation to be permissibly reasonably ones.[20]

The Respondent garnered testimony at hearing stating that the storing, drying, screening, and loading coal can all individually be considered incidental to process being performed and, thus, fall outside the purview of MSHA. While this may be true, these processes cannot

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20. 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 Res. 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. *Chevron,* 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC,* 917 F.2d 42, 44 (D.C. Cir. 1990). If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "Chevron II" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron,* 467 U.S. at 843-44; *Thunder Basin,* 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC,* 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron,* 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor,* 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied* , 520 U.S. 1209 (1997).

be viewed in isolation of one another. *Mineral Coal Sales, Inc.,* 7 FMSHRC at 620. "In examining the 'nature of the operation' performing work activities listed in Section 3(i), the operations taking place at a single site must be viewed as a collective whole." *Id.* at 620-21. When viewed collectively, the Respondent is storing large amounts of coal, screening it to remove impurities and ensure size quality, drying it, and loading it in bags appropriately sized to be sold in the stream of commerce. The fact that it is customizing the formulas to meet industry and customer specifications only strengthens the Secretary's position that the Respondent is operating a custom coal preparation facility and should, therefore, continue to be covered under MSHA's jurisdiction.

ORDER

Having found that Shamokin Filler Company is under the jurisdiction of the Mine Safety and Health Administration, it is **ORDERED** that the Respondent resume discussions with the Secretary concerning the underlying citations in this case.

John Kent Lewis
Administrative Law Judge

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APPENDIX H — ORDER OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, DATED OCTOBER 27, 2010

FEDERAL MINE SAFETY
AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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875 Green Tree Road, Suite 290
Pittsburgh, PA 15220
TELEPHONE: (412) 920-7240

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

Petitioner

v.

SHAMOKIN FILLER COMPANY, INC.

Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2009-775
PENN 2009-825
PENN 2010-63
A.C. No. 36-02945-209018

Mine: Carbon Plant

Appendix H

ORDER GRANTING SECRETARY'S MOTION IN LIMINE

The Secretary's Motion in Limine to preclude Respondent from offering any evidence or material at the 10/27/2010 hearing related to MSHA's inspection activity, or lack thereof, at any facility other than the Carbon Plant is hereby **GRANTED** for the following reasons:

1.) Pursuant to prior agreement between the Secretary and Respondent, the sole issue to be determined before the Court at the scheduled 10/27/2010 evidentiary hearing would be that of jurisdiction.

2.) After reviewing pertinent pre-hearing pleadings and holding pre-hearing conferences, this Court indicated that prior to commencement of the 10/27/2010 evidentiary hearing, it would hear full argument and offers of proof from the Secretary and Respondent regarding Secretary's Motion in Limine to preclude Respondent from offering evidence regarding MSHA's inspection activity, or lack thereof, at any facility other than the Carbon Plant at issue. After such, the Court would render its decision on Secretary's Motion in Limine.

3.) In her pleadings and at argument, the Secretary had contended that the issue of jurisdiction should be decided based upon essentially two inquires: (1) whether the Carbon Plant was a "coal or other mine" within the meaning of Section 3(h)(1)(C) of the Mine Act; and (2) whether the Carbon Plant engaged in the "work of preparing the coal" within the meaning of Section 3(h)(2)(i) of the Mine Act (30 USC §802(h)(2)(i)).

4.) In her pleadings and at argument, the Respondent has maintained that evidence that MSHA did not exercise jurisdiction over similar "bagging operations" such the Respondent's Carbon Plant was in fact clearly relevant to the ultimate issue of whether MSHA should exercise jurisdiction over the Carbon Plant.

After carefully considering the Secretary and Respondent's arguments, this Court finds that the evidence regarding MSHA' s exercise of jurisdiction, or lack thereof, over alleged similar facilities would be irrelevant to the present inquiry.

Under 29 CFR §2700.63, only relevant evidence is admissible. The only relevant evidence in the case *subjudice* is whether Respondent's Carbon Plant facility meets the criteria for a coal mine as set forth at Section 3(h)(1)(C) and whether the Carbon Plant facility's activities constitute "work of preparing the coal" under Section 3(h)(2)(i) of the Act.

This Court notes that MSHA determinations involving most matters under the Mine Act must almost always take into account the "specific physical characteristics of the Mine." *Peabody Midwest Mining*, 32 FMSHRC 892 (2010)(ALJ); *Twentymile Coal Company*, 30 FMSHRC 736 (2008). Specifically, MSHA determinations regarding Mine Act jurisdiction should be made on a case-by-case basis taking into consideration the statutory definition of a mine and the nature and purpose of the specific facility activities in question. *Pennsylvania Electric Company v. FMSHRC*, 969 F.2d 1501 (3rd Cir. 1992); *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5 (1982).

Respondent maintained that the Court should hear evidence regarding MSHA's deliberations and determinations about its exercise of jurisdiction regarding competitor "bagging operations" of Carbon Plant since 2004. This Court finds that such evidence would be irrelevant to the critical questions of what the Carbon Plant has been and is as a facility and what it has done and is doing in its operations. See also *Ohio Valley Transloading Company*, 19 FMSHRC 813 (1997)(in which the Court held that evidence pertaining to coal terminals at which MSHA knowingly has made a decision not to exercise jurisdiction would be irrelevant).

Although Section 2700.63 states that relevant evidence may be presented as long as it is not unduly repetitious or cumulative, the Rules do not define "relevancy" or its limitations. Therefore, the Commission may then look to the Federal Rules for guidance. *Cactus Canyon Quarries of Texas*, 23 FMSHRC 280 (2001). Pursuant to Rule 403 of the Federal Rules of Evidence, it is provided that evidence, although relevant, may be excluded if its probative value is, *inter alia,* substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if such introduction involves a waste of time or needless presentation of cumulative evidence.

Presentation of evidence of MSHA's lack of enforcement at other similar facilities, including Keystone Filler and Manufacturing and Kimmel's Coal and Packaging would, in this Court's opinion, involve all of the foregoing pejorative evidentiary consequences. For example, this Court finds that it would be quite cumbersome and

impractical, in evaluating whether the Carbon Plant is subject to MSHA jurisdiction, to begin by reviewing whether and why MSHA has exercised or should exercise jurisdiction over similar "bagging facilities" located in the Carbon Plant's geographical area and in other parts of the country. The collateral inquiries would be endless including, in the case *subjudice,* why some other "bagging plants" chose not to leave MSHA jurisdiction, what similarities and dissimilarities each bagging plant had vis-à-vis the Carbon Plant. See *Dicaperal Minerals Corporation*, 28 FMSHRC 720 (2006)(ALJ)(in which the Court noted the overly burdensome evidentiary demands in the Secretary's evaluating the lack of exercise of jurisdiction over substantially similar perilite facilities as compared to Respondent's plant).

In granting of the Secretary's Motion in Limine, this Court has not prejudiced the Respondent's ability to present a full case as to why MSHA should refrain from further exercise of jurisdiction. The Respondent may present:

1) Live and depositional testimony, in its case in chief and on cross-examination, from Carbon Plant owners/operators, past and present employees, and MSHA personnel as to the specific physical characteristics of the Carbon Plant, its nature and purpose, its specific activities, and whether such meets the definition of a "coal or other mine" and the "work of preparing the coal" under the Mine Act and/or related provisions of the Interagency Agreement between MSHA, the US Department of Labor, and OSHA; and

2) Photographic and documentary evidence in support of the foregoing.

3) Expert witness testimony in support of the foregoing.

4) Evidence establishing or tending to prove that MSHA, in or about 2004 or thereafter, determined that the Carbon Plant should be excluded from MSHA jurisdiction and any evidence showing that determination was conveyed to the Respondent.

For all of the foregoing reasons, the Secretary's Motion in Limine is **GRANTED.**

/s/__________________
John Kent Lewis
Administrative Law Judge

APPENDIX I — ORDER OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, DATED OCTOBER 27, 2010

FEDERAL MINE SAFETY
AND HEALTH REVIEW COMMISSION

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

Petitioner

v.

SHAMOKIN FILLER COMPANY, INC.

Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2009-775
PENN 2009-825
PENN 2010-63
A.C. No. 36-02945-209018

Mine: Carbon Plant

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

Respondent's Motion to Compel is hereby **DENIED**. The six (6) memoranda that Respondent seeks to be released from the Secretary are all found to be irrelevant to the present jurisdictional inquiry as more fully set forth in this Court's attached Order Granting Secretary's Motion in Limine. Said six (6) memoranda are further found to be protected by either attorney-work product privilege, attorney-client privilege, and/or deliberate process privilege and therefore may not be admitted into evidence.

/s/__________________
John Kent Lewis
Administrative Law Judge

APPENDIX J — RELEVANT STATUTORY PROVISIONS

Relevant Statutory Provisions of the Mine Act

30 U.S.C. § 802(h)(1). '[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. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment. Mine Act, Section 3(h)(1).

30 U.S.C. § 802(h)(2). For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by

any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities. Mine Act, Section 3(h)(2).

30 U.S.C. § 802(i). "work of preparing the coal" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine. Mine Act, Section 3(i).

30 U.S.C. § 803. Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act. Mine Act, Section 4.

30 U.S.C. § 902(d). The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. Black Lung Benefits Act, Section 402(d).