Recent Decisions Under the Federal Mine Safety and Health Act of 1977

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RECENT DEVELOPMENTS

RECENT DECISIONS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977*

This survey of recent decisions under the Federal Mine Safety and Health Act (the Mine Act) is designed to bring into view significant developments in mine safety and health law. These cases demonstrate a further delineation of the powers which may be exercised by the Federal Mine Safety and Health Commission (the Commission), and the imposition of important new procedural limitations upon administrative law judges. Several Commission rulings have refined, and in some cases notably changed, the burdens and elements of proof required to establish particular violations of mandatory standards. Finally, as relevant terms have taken on new meanings, substantial developments have occurred regarding enforcement mechanisms and relating to the propriety of mine closure orders.

I. POWERS OF THE COMMISSION AND ADMINISTRATIVE LAW JUDGES

A. Kenny Richardson

In Kenny Richardson, the Commission ruled that it is empowered to decide constitutional questions arising under the Mine Act and the Act's regulations. While recognizing the traditional

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2 The Federal Mine Safety and Health Review Commission [hereinafter the Commission] is an independent, quasi-judicial agency created by section 113 of the Mine Act. The Commission, which consists of five members and seventeen administrative law judges, reviews contested enforcement actions of the Labor Department's Mine Safety and Health Administration.

view that administrative agencies lack the authority to determine the constitutionality of legislation, the Commission found the rationale supporting that view to be "deficient with respect to the situation here presented."'

In reaching this conclusion the Commission evaluated its role in relation to the overall regulatory scheme of the Mine Act. In so doing, the Commission observed that primary adjudicative jurisdiction over disputes arising under the Mine Act lies with itself, rather than with the United States district courts; and that in performing its responsibilities, the Commission is congressional ly authorized to independently decide questions of fact, law, and policy. The Commission reasoned that it could not "properly fulfill [its] duty to [both] interpret the law and apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution."'

Distinguishing itself from more typical governmental agencies, the Commission noted that the Mine Act establishes the Commission as an independent adjudicatory agency. Because the Commission is vested with purely adjudicative responsibilities, it is believed to be less likely to harbor those biases inherent in agencies which simultaneously regulate, prosecute and adjudicate. The absence of these combined functions renders the Commission invulnerable to the pressure which may be exerted upon the adjudicatory components connected to a larger executive department. Such independence is thought by the Commission to "assure the necessary impartiality for deciding constitutional questions."'

The singularly judicial nature of the Commission's proceedings is the guarantor of due process. The proceedings are governed in large part by the Administrative Procedures Act; and should

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4 3 FMSHRC at 18, 2 MSHC (BNA) at 1121.
5 Id. at 19, 2 MSHC (BNA) at 1122.
7 3 FMSHRC at 19, 2 MSHC (BNA) at 1122.
8 Section 113 of the Mine Act (codified at 30 U.S.C. § 823 (Supp. IV 1980)).
9 3 FMSHRC 19, 2 MSHC (BNA) 1122.
10 The Administrative Procedures Act, Pub. L. No. 89-554, 80 Stat. 381 (1966) (codified at S.V.S.C. § 551 (1976)), is applicable through section 105(d) of the Mine Act which provides that hearings must be conducted in accordance with 5 U.S.C. § 554. (1976)).
an aggrieved party question the Commission's decision, an avenue of appeal is open to the United States Court of Appeals.\textsuperscript{11}

In final analysis, the Commission's conclusion that it possesses the "institutional competence to decide constitutional issues"\textsuperscript{12} is founded upon three considerations: (i) the nature of the Commission's proceedings; (ii) the judicial ethos of its membership;\textsuperscript{13} and (iii) its exclusively adjudicative role under the Mine Act.

B. \textit{American Coal v. Department of Labor}

The United States Court of Appeals for the Tenth Circuit decided that federal district courts are without subject matter jurisdiction to review withdrawal orders issued under section 103(k) of the Mine Act.\textsuperscript{14} In \textit{American Coal Co. v. Department of Labor},\textsuperscript{15} the court ruled that such orders are "subject, first to administrative review, with final action by the Review Commission to then be subject to judicial review in the appropriate court of appeals under 30 U.S.C. § 816."\textsuperscript{16}

Although 30 U.S.C. § 813(k) does not expressly provide for administrative review of action taken pursuant to the statute, "[a] reading of the entire Act, coupled with its legislative history\textsuperscript{17}"

\textsuperscript{12} 3 FMSHRC 20, 2 MSHC (BNA) 23.
\textsuperscript{13} 30 U.S.C. § 823(a) (Supp. IV 1980).
\textsuperscript{14} The order was issued pursuant to 30 U.S.C. § 813(k) which provides: In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, or any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.
\textsuperscript{15} 639 F.2d 659, 2 MSHC (BNA) 1105 (10th Cir. 1981).
\textsuperscript{16} Id. at 660, 2 MSHC at 1106.

A five member Mine Safety and Health Review Commission is created as a separate entity. The Commission is empowered to act in panels of three members. The Commission serves as the ultimate administrative review body for disputed cases arising under the new mine
convinced the American Coal court that to permit federal district court jurisdiction would "substantially decrease the effectiveness of the statutory design."18

This rationale is bolstered by the United States Supreme Court decision in Whitney Bank v. New Orleans Bank.19 There, the Court ruled that when "Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. . . ."20

C. Olga Coal Co.

Several Commission decisions have helped delineate the powers which may be properly exercised by administrative law judges, who, along with the Commission, are bound by the Administrative Procedures Act.21

In Olga Coal Co.,22 the Commission held that an administrative law judge possesses "the inherent authority to question whether,
as a matter of law, a case before him presents a cause of action.”

Before issuing a final ruling on that question, however, he must first afford the parties an opportunity to submit arguments in support of their cause “when time, the nature of the proceedings and the public interest permit.” Thus, in Olga Coal Co., an administrative law judge was held in error when he sua sponte vacated a citation and dismissed a penalty proceeding without first providing the Secretary of Labor an opportunity to be heard.

D. Eastern Associated Coal Corp.

In Eastern Associated Coal Corp., the Commission ruled that an administrative law judge acted beyond his authority by dismissing without prejudice an operator's notice of consent of a withdrawal order after he had ordered the parties to show cause why the order should not be stayed until the associated penalty contest arose.

At the inception of this case an inspector issued Eastern Associated a withdrawal order under section 104(d)(1) of the Mine Act. Eastern complied with the order, abated the violation (and thereby terminated the order), and then rejoined by promptly filing a notice of contest under section 105(d) of the Mine Act. Both the Secretary of Labor and the United Mine Workers of America filed appropriate responses to this notice. The administrative law judge then issued sua sponte an order to all parties to show cause why the proceedings on the withdrawal order should not be stayed until either, (i) a penalty contest concerning the alleged violation which gave rise to the withdrawal order was filed and could be consolidated with the contest of the withdrawal order; or (ii) Eastern Associated waived further proceedings under 30 C.F.R.

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23 Id., cf. Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973); 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1357, at 593 (and cases cited at note 43).

24 2 FMSHRC at 2770, 1 MSHC at 2537 (making reference to 5 U.S.C. § 554(c)).

25 Id.

26 2 FMSHRC 2774, 2 MSHC (BNA) 1011 (1980).

27 The Mine Act's § 104(d)(1) (codified at 30 U.S.C. § 814(d)(1) (Supp. IV 1980)) gives a federal mine inspector the authority to issue a withdrawal order based on repeated findings of an operator's unwarrantable failure to comply with mandatory health or safety standards. After an inspector determines the violation causing the order to have been abated, he will terminate the withdrawal order.

Part 100 and agreed to consolidation. The administrative law judge stated the purpose of the order was "to conserve scarce judicial resources, and to expedite the disposition of all claims pertaining to the conditions or practices giving rise to the contest of the violation charged in the withdrawal order."

Eastern Associated sought to prevent the stay because prior to the adjudication of the penalty proceeding, it could be subjected to a chain of potentially damaging closure orders founded upon the withdrawal order and underlying citations. The Secretary of Labor, however, did not object to the stay.

Eastern's plea to avoid the postponement of adjudication of the withdrawal order was to no avail. The judge ordered the notice

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30 C.F.R. §§ 100.3-.6 contain a series of MSHA regulations governing the MSHA Office of Assessments' procedures for issuing notifications of proposed assessment of penalty under section 105(a) and (b) of the Act. The regulations provide operators with an opportunity to review the Assessment Office's tentative penalty proposal (i.e., before it becomes a formal notification of proposed assessment of penalty). Operators may request a conference or may submit additional evidence pertaining to the penalty amount tentatively proposed by the Assessment Office. Thereafter, the Assessment Office, which may or may not change its tentative amount, issues a notification of proposed assessment of penalty under the statute. The operator may then pay the proposed assessment, or contest it before the Commission and obtain a de novo determination as to the fact of violation and assessment of a penalty.

2 FMSHRC at 2775, 1 MSHC at 1012.

The Commission explained the mechanism by which such a chain of closure orders could occur:

Eastern Associated's concern with further withdrawal orders derives from the enforcement scheme set out in sections 104(d) and (e) of the Act. Section 104(d) of the Act permits an MSHA inspector to include in citations issued under section 104(a) "unwarrantable failure" and "significant and substantial" findings. If, within the 90-day period following the issuance of the citation, an inspector finds what he believes to be another violation of a standard, and finds that the second violation was caused by an unwarrantable failure to comply, an order is issued requiring withdrawal of miners until the inspector finds that the violation has been abated. Thereafter, additional withdrawal orders must be issued if, prior to an inspection that discloses no similar violations, an inspector finds violative conditions similar to those that precipitated the first withdrawal order. Section 104(e) also permits the issuance of withdrawal orders if an operator has a "pattern" of "significant and substantial" violations, and, within 90 days after the issuance of a notice to that effect, another "significant and substantial" violation is found. Further withdrawal orders may be precipitated by subsequent "significant and substantial" findings. 2 FMSHRC at 2776, 1 MSHC at 1012.
of contest dismissed because he was not shown an urgent need why the order should be immediately reviewed.

The Commission granted Eastern's petition for discretionary review, and found the administrative law judge to have erred by dismissing the notice of contest when this order to show cause mentioned only a stay of proceedings. The dismissal was deemed improper because Eastern was not given fair notice that it might occur, and was thereby denied its right to argue against it.2

The Commission ruled further "that a stay rather than a dismissal without prejudice is the appropriate procedural device for postponing adjudication of a contest of a withdrawal order . . . ."33 In the instant case, however, even a stay would have been inappropriate, for section 105(d) of the Mine Act directs the Commission to "take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."34 Thus, an administrative law judge may not require an operator to show urgent need in order to receive a hearing on his notice of contest prior to the associated penalty proceeding.

E. Sewell Coal Corp.

The Commission held in Sewell Coal Co.35 that section 5(a) of the Administrative Procedures Act limits an administrative law judge's discretion in scheduling hearing dates.36 The administrative law judge in Sewell had initially solicited mutually acceptable hearing dates from the parties. He then scheduled a hearing date at a time in substantial disaccord with Sewell's response.37 Although

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2 This right is guaranteed by the Administrative Procedures Act at 5 U.S.C. § 554(e), which states that "the agency shall give all interested parties opportunity for the submission of . . . arguments . . . ."

33 2 FMSHRC at 2777, 2 MSHC at 1012. In a similar situation, the Commission has ruled that an administrative law judge erred in dismissing a case without prejudice when the parties had agreed to a continuance of the case. Republic Steel Corp., 2 FMSHRC 2777, 2 MSHC (BNA) 1014 (1980).


35 2 FMSHRC 2479, 1 MSHC (BNA) 2513 (1980).

36 Section 5(a) of the Administrative Procedures Act, 5 U.S.C. § 554(b) (1976) is made applicable under section 105(b) of the Mine Act, and states that "[i]n fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representative."

37 Sewell responded to the judge's request for convenient hearing dates with a proposal for any of several dates in October of 1979. The judge, however, set the cases for hearing on February 5, 1980.
Sewell requested a rescheduling of the hearing, the judge refused and ultimately issued a default judgment against Sewell after it failed to appear at the hearing.

By his failure to so much as consider Sewell's alleged schedule conflict and motion for continuance, the judge displayed an absence of "due regard"\(^\text{38}\) for the convenience of the parties. The judge's lack of such "due regard" was held to constitute an abuse of discretion. The Commission ruled that an administrative law judge "should at least give consideration to their responses"\(^\text{39}\) after requesting parties to recommend hearing dates prior to docketing the case. His accommodation of those responses, however, "is a matter that falls within his discretion, dependent on several factors, including, but not limited to, the convenience of the parties."\(^\text{40}\)

F. Anaconda Co.

In Anaconda Co.,\(^\text{41}\) the Commission reviewed three cases in which an administrative law judge had found that the Secretary of Labor failed to meet the requisite burden of proof in demonstrating a violation of a regulatory mandate.\(^\text{42}\) The judge heard the three cases together, and for each case rendered a cursory decision consisting of a short summary of the evidence followed by virtually indistinguishable discussions of the law.

In reviewing these cases, the Commission sought to "determine whether the judge's decisions satisfied the requirements of section 8(b) of the Administrative Procedures Act, 5 U.S.C. § 557(c) and [the Commission's] rule 65, 29 C.F.R. § 2700.65. . . ."\(^\text{43}\) These requirements compel an administrative law judge to include written findings of fact, conclusions of law, and supporting reasons in their decisions.\(^\text{44}\) Such requirements are designed to prevent arbitrary decisions and to permit meaningful review.

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\(^{38}\) Supra note 36.

\(^{39}\) 2 FMSHRC at 2480, 1 MSHC at 2514.

\(^{40}\) Id.

\(^{41}\) 3 FMSHRC 299, 2 MSHC (BNA) 1154 (1980).

\(^{42}\) The mandatory standard at issue in these cases was 30 C.F.R. § 55.16-19 which requires that men stay clear of suspended loads.

\(^{43}\) 3 FMSHRC at 299, 2 MSHC at 1155.

\(^{44}\) 5 U.S.C. § 557(c)(3) provides in part:

All decisions, including initial, recommended, and tentative decisions are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on
Perceiving its function to be essentially one of review, the Commission noted that "without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively." The three decisions reviewed were found to be deficient in both findings of fact and supporting reasons, for they had "cross[ed] the line from the tolerably terse to the intolerably mute." Hence, the conclusory decisions were held to be insufficient and were reversed and remanded.

II. PROCEDURAL ISSUES

A. Finality

The requirement that an administrative law judge must finally dispose of proceedings before him has been addressed in several cases. In Council of Southern Mountains, Inc. v. Martin County Coal Corp., the Commission decided that an administrative law judge’s ruling which ordered an operator to "reimburse plaintiff for all attorney’s fees and other expenses . . ." was not final "because the amount of the attorney’s fees and costs [was] not resolved." Thus, as the judge’s ruling did not fully and finally dispose of the case as required by section 113(d)(1) of the Mine Act and Commission Rule 65(a), it was not amenable to review by the Commission.

Procedural Rule 65 provides in part:

(a) Form and content of the judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of facts, conclusions of law, and the reasons or bases for them, on all material issues of fact, law, or discretion presented by the record, and an order. (emphasis added.)


3 FMSHRC at 300, 2 MSHC at 1154.

Id. at 302, 2 MSHC at 1156, citing WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Section 113(d)(1) of the Mine Act provides that "an administrative law judge . . . shall make a decision which constitutes his final disposition of the proceedings."

2 FMSHRC 3216, 2 MSHC (BNA) 1058 (1980).

Id., 2 MSHC at 1059.

Id.
In *Monterey Coal Co. v. Federal Mine Safety and Health Review Commission*, the United States Court of Appeals for the Fourth Circuit held that the Commission's decision to reverse and remand an administrative law judge's ruling is not a final order, and is therefore not subject to appeal.

In deciding whether the petition for review was premature, the court looked to the statutory language and the legislative history before finding "Congressional intent that only final Commission orders should be reviewed." As the Commission directed additional agency action on remand, its decision was not deemed final. This conclusion is consistent with holdings in both the District of Columbia and Sixth Circuits, and appears to solidify a stringent standard of finality for appeals under 30 U.S.C. § 816(a)(1).

B. Default Judgments

The Commission has provided standards relating to the entry of default judgments in *Sigler Mining Co.* and *Easton Construction Co., Inc.* In these cases the Commission has indicated a policy of disfavoring orders of default. Default judgments are considered by the Commission to be "harsh" and "not suitable when a party has substantially complied with a show cause order, and has not demonstrated bad faith."

C. Late Filing

In *Salt Lake County Road Department*, the Commission faced the issue of whether a penalty proposal should be dismissed by reason of its late filing. Commission Rule 27 requires the Secretary of Labor to file a proposed assessment of penalty with

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52 635 F.2d 291 (4th Cir. 1980).
55 635 F.2d at 292.
56 Canterbury Coal Co. v. Secretary of Labor, No. 80-1834 (D.C. Cir. 1982); Richardson v. Secretary of Labor, No. 79-3059 (6th Cir. 1982).
58 3 FMSHRC 314, 2 MSHC (BNA) 1162 (1981).
59 *Id.* at 315, 2 MSHC at 1163 citing Sigler, supra note 57.
60 19 FMSHRC 1389, 2 MSHC (BNA) 1389 (1981).
61 29 C.F.R. § 2700.27(a).
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the Commission not later than 45 days after the Secretary has received a timely filed notice of contest. The rule was held by the Commission to not constitute a statute of limitation. Thus, a proposal for penalty filed late, although certainly not favored, does not require a dismissal of the proceeding unless the opposing party is prejudiced by the delay.

In this case, Salt Lake County was cited for violating a mandatory standard which required exposed moving machine parts to be guarded. The Secretary proposed a penalty, and in accordance with section 105(a) of the Mine Act Salt Lake County filed a notice of contest. The Secretary was then obligated to "immediately advise the Commission of such notification" under section 105(d) of the Mine Act. The Commission's Rule 27, however, requires the Secretary to so advise "within 45 days of receipt of timely notice of contest." These two requirements avoid contradiction as the Commission's Rule 27 is read to "implement the meaning of 'immediately'." The Secretary filed the appropriate pleading with the Commission two months subsequent to this deadline. Yet, in spite of Salt Lake County's motion to dismiss, the administrative law judge accepted the Secretary's late filing, found a violation, and assessed a penalty.

In considering the propriety of this ruling, the Commission looked to the objective of the Mine Act's section 105(d). It found the primary purpose of the Act's "immediacy" requirement is "to provide for prompt and efficient enforcement." The fact that the requirement works to protect operators from stale claims was characterized by the Commission as "incidental."

By interpreting Rule 27 consistently with the Mine Act's focus

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63 Under section 105(a) of the Mine Act, 30 U.S.C. § 815(b)(1)(A) "the operator has 30 days within which to notify the secretary that he wishes to contest the secretary's notification of the proposed assessment penalty." Id. The Commission has ruled that the 30 day time period for filing a notice of contest is met if the notice is mailed (rather than received) within the time period. J. P. Burroughs & Son, Inc., 3 FMSHRC 854, 2 MSHC (BNA) 1275 (1981).
64 The Mine Act, § 105(d); 30 U.S.C. § 815(d) (Supp. IV 1980).
65 29 C.F.R. § 2700.27.
66 2 MSHC (BNA) at 1390.
67 Id.
68 Id.
on enforcement, the Commission concluded that the rule did not create a strict 45 day period of limitation. It should be noted, however, that the Secretary is not free to ignore the rule's time constraint; and when seeking permission to file late “he must predicate his request upon adequate cause.”

In addressing the issue of procedural fairness the Commission recognized that “a stale penalty proposal may substantially hinder the preparation and presentation of an operator’s case.” Hence, “an operator may object to a later penalty proposal on the grounds of prejudice.” This holding is compatible with the fundamental principle of administrative law that absent a showing of prejudice, “the substantive agency proceedings and the effectuation of a statute’s purpose are not to be overturned because of procedural error.”

III. MANDATORY SAFETY AND HEALTH STANDARDS

As the Commission interprets mandatory safety and health standards in relation to the particular cases brought before it, a general body of law emerges. It is hoped that the cases surveyed below will prove helpful in discerning trends in that general body, while better defining the requirements necessary to establish particular violations.

A. Accumulations of Combustible Material

The Commission held in Old Ben Coal Co. that “in establishing the fact of violation, the absence of evidence of depth and extent of combustible materials will not, in and of itself, be cause for vacating a citation alleging a violation of 30 C.F.R. § 75.400.” If an inspector deems a quantity of combustible material to be likely to “cause or propagate a fire or explosion,” then an accumulation

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69 Id.
70 2 MSHC at 1391.
71 Id.
72 Id. See also Almbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1383-84 (8th Cir. 1980); Jensen Construction Co. v. OSHRC, 597 F.2d 246, 247-48 (10th Cir. 1979).
73 2 FMSHRC 2807, 2 MSHC (BNA) at 1017 (1980).
74 2 FMSHRC at 1018, 2 MSHC at 1018.
75 30 C.F.R. 75.400 reads in pertinent part, “coal dust ... and other combustible materials, shall be cleaned up and not permitted to accumulate in active workings or on electric equipment therein.”
exists sufficient to support the citation. The Commission noted, however, that the “validity of [the inspector’s] judgment is, of course, subject to challenge....”

In another case involving Old Ben, the company defended against a 30 C.F.R. § 400 violation citation by contending that the cited area (a 2500 foot return air course) was not an “active working” as required by the regulation and defined by the Mine Act.

The issue of whether the function of a particular area should qualify or disqualify such area as an active working was left undecided by the Commission. However, because the area was (i) inspected weekly, (ii) periodically rock dusted and (iii) traveled as an escape route, the Commission found that the return air course constituted an active working under the standard.

B. Respirable Dust

In Alabama By-Products Corp., the Commission ruled that the respirable dust regulation is a valid and enforceable standard. “Respirable dust” is defined in the Mine Act as “the average concentration of respirable dust measured with a device approved by the Secretary [of Labor] and the Secretary of [Health and Human Resources].” Alabama By-Products contended that the standard was unenforceable as written because neither of the above-

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76 Id. at note 7.
77 Old Ben Coal Co., 3 FMSHRC 608, 2 MSHC (BNA) 1188 (1981).
78 See supra note 74.
79 Id.
80 Section 318(g)(A) of the Federal Coal Mine Health and Safety Act of 1969 (the predecessor of the Mine Act), 30 U.S.C. § 801-960 (1976) (amended in 1977) provided: “‘active working’ means any place in a coal mine where miners are normally required to work or travel.” Id.
81 2 FMSHRC 2760, 1 MSHC (BNA) 2532 (1980).
82 30 C.F.R. § 70.100(b) states in pertinent part: [E]ach operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. This standard restates section 202(b)(2) of the former Federal Coal Mine Health and Safety Act of 1969 [the 1969 Coal Act], 30 U.S.C. § 842(b)(2) (1976), and section 202(b)(2) of the 1977 Mine Act, 30 U.S.C. § 842(b)(2) (Supp. II 1978).
83 Section 202(b)(2) of the Mine Act.
mentioned secretaries had approved of such a device subsequent to the enactment of the Mine Act.\textsuperscript{64}

The Commission adopted the position that Congress intended to:

\begin{quote}
define respirable dust [in the 1977 Mine Act] as that which is collected with a device approved by the Secretary of the Interior and the Secretary of Health Education and Welfare before the effective date of section 202 of the Mine Act or by the Secretary of Labor and the Secretary of [Health and Human Services] thereafter.\textsuperscript{65} (emphasis added).
\end{quote}

It appears that because the 1977 amendment's definition of respirable dust conforms to the method of sampling approved prior to the enactment of that amendment, the Commission concluded Congress did not intend to create any lapse in enforcement, and hence held the standard to be valid as written.

\textsuperscript{64} The average concentration is determined through sampling of the in-mine atmosphere with a device which collects respirable dust particles. The type of device most often used, and the one used in these matters, is the personal sampler. The Interior Board of Mine Operations Appeals [Board] described the sampling device and the procedures used for analyzing the samples it produces as follows:

[The] device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10mm. in diameter which is supposed to separate the respirable from the nonrespirable particulates. Theoretically, only the former reaches the filter where the particulates are captured. The filter is the analog of the lobes of a human lung.

The manufacturer of the personal air sampler weighs each filter before sealing it in the device and records the weight on an attached data card. After the sample is collected, the sampler is forwarded to a MESA laboratory.

At the laboratory each sampler is opened and among other things the filter is weighed so that a comparison can be made with the weight recorded on the data card by the manufacturer. Theoretically, the result reflects the weight of the particulates which were being deposited on the lungs of the wearer of the sampler at the time the sample was taken.

\textsuperscript{65} Section 202(a) of the Mine Act amended section 202(e) of the 1969 Coal Act, 30 U.S.C. 842(b)(2) (1976) by redefining respirable dust.

\textsuperscript{66} 2 FMSHRC at 2765, 2 MSHC at 2536.
C. Equipment Defects

In Everett Propst and Robert Stemple, bad brakes on a payloader resulted in a citation for violating 30 C.F.R. § 77.40(a). According to this standard, operators must maintain equipment in "safe operating condition." In this case, because the "defects in the braking system rendered it unsafe under any meaning of that term," the Commission rejected an attempt to distinguish "unsafe" from "defective" equipment. Left open for consideration, however, was the situation "in which a defect in the equipment would not necessarily render the equipment 'unsafe' within the meaning of 30 C.F.R. § 77.404(a)."

D. Audible Warning Devices

A conflict between a mandatory safety and health standard and the Mine Safety and Health Administration's Inspection Manual was resolved by the Commission in King Knob Coal Co.. King Knob was cited for violating 30 C.F.R. § 77.410 because its pickup truck was not equipped with a proper reverse gear audible warning device. The standard requires this device on all "[m]obile equipment, such as trucks," while the manual's guidelines explaining this standard exempted pickup trucks from the requirement.

87 3 FMSHRC 304, 2 MSHC (BNA) 1156 (1981).
88 30 C.F.R. § 75.404(a) provides: "Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." Id. (emphasis added).
89 2 FMSHRC at 306, 2 MSHC at 1158.
90 Id.
91 3 FMSHRC 1417, 2 MSHC (BNA) 1372 (1981).
92 30 C.F.R. § 77.410 provides: "Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse." (emphasis added).
93 This manual provides:
[that any] vehicle being operated on the mine property that is capable of going in reverse shall be equipped with an automatic warning device which shall give an audible alarm when such equipment starts moving in a reverse direction, and remain in operation during the entire reverse movement.

The warning device required by this section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles, where the operator's
Viewing the commentary in the manual as an "attempted modification of the standard's requirements," the Commission ruled that the manual did not override the standard because the manual's modifications were not promulgated in accordance with the Administrative Procedures Act. Hence, the modifications were held to "lack the force and effect of law."

King Knob also contended that because it was equitably entitled to rely on the manual's pickup truck exception, the Secretary was equitably estopped from finding a violation. This argument, however, proved unpersuasive as the Commission observed that equitable estoppel generally does not apply against the federal government, and further noted that the estoppel defense is inconsistent with the no fault structure of the Mine Act. The violation thus resulted in a finding of liability.

E. Elevated Roadways

"Berms or guards shall be provided on the outer bank of elevated roadways," is the language of the mandatory standard interpreted in Burgess Mining and Construction Co. An administrative law judge read the standard to be limited to "roads cut along the side of a mountain, hill, pit, wall or earth bank and not... to a bridge crossing a river."

9 Section 101(a) of the Mine Act, 30 U.S.C. § 811(a) (Supp. IV 1980) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with section 553 of the Administrative Procedures Act.

3 FMSHRC at 1420, 2 MSHC at 1374.


30 C.F.R. § 77.1605(k).

99 3 FMSHRC 296, 2 MSHC (BNA) 1137 (1981).

100 Id.
The Commission reversed this decision as it was unable to logically discern "why a roadway ceases being such when it crosses a bridge." The Commission cited authority for the less than subtle proposition that, "a bridge is nothing more than a part of a road which crosses a stream," and held that a bridge is an elevated roadway and hence requires berms or guards on each outer bank.

IV. SIGNIFICANT AND SUBSTANTIAL VIOLATION

The determination of a significant and substantial violation under the Mine Act may have expensive and far reaching consequences. Such a violation when coupled with either an operator's unwarrantable failure to comply with a mandatory standard or his engaging in a pattern of violations will trigger the withdrawal order sequences of section 104(d)-(e) of the Mine Act. The Com-

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102 Id. at 297, 2 MSHC at 1137.
104 Under section 104(d)(2) of the Mine Act, repeated "unwarrantable failure" violations will result in closure orders unless a complete clean inspection (i.e. one showing no unwarrantable failure to comply with a standard) has intervened. The establishment of a valid issuance of a withdrawal order under this section is predicated on the Secretary's ability to prove that intervening inspections were not complete and clean. See United States Steel Corp., 3 FMSHRC 5, 2 MSHC (BNA) 1100 (1981); CI & F. Steel Corp., 2 FMSHRC 3459, 2 MSHC (BNA) 1057 (1980).
105 Section 104(d) & (e) of the Mine Act provides:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized
mission set the criteria under which a violation of a mandatory safety or health standard may properly be found to "significantly representative to the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon an inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard. The pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists. (emphasis added).
and substantially contribute to the cause and effect of a coal or other mine safety or health hazard"\textsuperscript{106} in \textit{Cement Division, National Gypsum Co.}.\textsuperscript{107}

The Commission held that a violation could properly be characterized as significant and substantial if, "based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."\textsuperscript{108} This interpretation places the initial burden on the mine inspector to "exercise his own judgment in evaluating the hazard presented by the violation in light of surrounding circumstances."\textsuperscript{109}

Thus, before an inspector may find a violation to be of significant and substantial nature, he must first determine the seriousness of the hazard contributed to by the violation by postulating the potential injury or illness which may result. If such injury or illness is considered reasonably serious, the inspector must then calculate the likelihood of such harm occurring.

Aside from further complicating the inspector's task, this holding appears to be in semantical disaccord with the language of the Mine Act. The words "significantly and substantially" are adverbs, and it is beyond cavil that they are intended by Congress to modify "contribute."\textsuperscript{110} The Commission's rule, however, directs an inspector to predict the consequences of the hazard rather than the consequences of the violation's contribution to that hazard. Hence, it appears as though we may expect the rule to be adjusted so as to better comport with the parlance of the Mine Act.

V. DECISIONS LIMITING DEFENSES

A. Vicarious Liability

Section 110(a)(1) of the Mine Act authorizes the assessment of a civil penalty against a mine operator upon the determination of the occurrence of a violation of a safety or health standard in

\textsuperscript{106} See supra note 105.
\textsuperscript{107} 3 FMSHRC 822, 2 MSHC (BNA) 1201 (1981).
\textsuperscript{108} \textit{Id.} at 825, 2 MSHC at 1203.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} This assertion was indeed conceded by counsel for the operator during oral argument. \textit{Id.} at 838, 2 MSHC (BNA) at 1210 (Lawson, C., dissenting).
that operator's mine.\textsuperscript{111} In \textit{Heldenfels Brothers, Inc. v. Marshall and FMSHRC},\textsuperscript{112} an operator defended against liability on the ground that it did not cause the violation.\textsuperscript{113} The court, however, found the operator to be liable for the violations since "Congress has provided for a sort of vicarious liability to accompany the provision for strict liability."\textsuperscript{114}

In \textit{Nacco Mining Co.},\textsuperscript{115} the Commission found an operator vicariously liable for its foreman's violation of 30 C.F.R. 75.200.\textsuperscript{116} Under the principles of agency embodied in the 1969 Coal Act, the foreman's actions were attributable to Nacco without regard to the issue of fault.\textsuperscript{117}

Although a foreman's negligence may properly enter into the penalty evaluation against an operator,\textsuperscript{118} it need not be imputed in all cases. Nacco established both the adequacy of its foreman selection process and training program, and that the foreman engaged in "wholly unforeseeable misconduct"\textsuperscript{119} which did not expose others to harm. Hence, the Commission declined to impute the foreman's negligence to Nacco because it concluded that imputing negligence in penalty assessments under such circumstances "would not fairly or sensibly promote the Coal Act's safety purposes."\textsuperscript{120}

B. Greater Hazard

In \textit{Penn Allege Coal Co., Inc.},\textsuperscript{121} Penn Allege was cited for

\begin{itemize}
  \item \textsuperscript{111} The Mine Act's section 110(a), 30 U.S.C. 820(a) (Supp. IV 1980) provides, "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary. . . ." \textit{Id.}
  \item \textsuperscript{112} 2 MSHC (BNA) 1107 (9th Cir. 1981).
  \item \textsuperscript{113} A mining accident occurred as a result of the fault of a Heldenfel employee. Heldenfel's Bros., Inc. was then charged with violating 30 C.F.R. § 55.9-24 which requires operators of equipment to control their vehicles while in motion.
  \item \textsuperscript{114} 2 MSHC at 1109.
  \item \textsuperscript{115} 3 FMSHRC 848, 2 MSHC (BNA) 1272 (1981).
  \item \textsuperscript{116} 30 C.F.R. 75.200 is drawn from section 302(a) of the 1969 Coal Act and provides in pertinent part: "No person shall proceed beyond the last permanent support unless adequate temporary support is provided. . . ."
  \item \textsuperscript{117} 3 FMSHRC at 849, 2 MSHC at 1272; \textit{see also} Pocahontas Coal Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979).
  \item \textsuperscript{118} Ace Drilling Co., Inc., 2 FMSHRC 790, 1 MSHC (BNA) 2357 (1980).
  \item \textsuperscript{119} 3 FMSHRC at 850, 2 MSHC at 1274.
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} Penn Allege Coal Co., Inc., 3 FMSHRC 1392, 2 MSHC (BNA) 1353 (1981).
\end{itemize}
failure to comply with 30 C.F.R. § 75.710 which requires the installation of protective cabs or canopies on all self-propelled electric face equipment. At the enforcement proceeding the operator asserted that compliance with the regulation would actually diminish rather than enhance the safety of the miners. The Commission rejected the "greater hazard" defense by reasoning that such arguments are better suited for modification proceedings.

Section 101(c) of the Mine Act provides for a mechanism which addresses the situation where application of a particular standard diminishes the miner's safety. These modification proceedings are readily distinguishable from enforcement proceedings. In the former the operator must show why compliance should be waived in light of particular circumstances, while in the latter, the Secretary carries the burden of proving the occurrence of a violation applicable to the mining industry in general.

Raising such a question at an enforcement proceeding, which could have been resolved at a modification proceeding, was seen by the Commission as a "short-circuiting of the Act's modification procedures," and therefore improperly raised. One should note, however, that in those limited situations where a variance application would be inappropriate, it appears as though a "greater hazard" defense may be properly asserted at an enforcement proceeding.124

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122 In such situations, the operator is required to petition the Secretary for relief from the application of the standard. Upon receipt of such a petition the Secretary gives notice, conducts an investigation, provides an opportunity for a public hearing, and issues a decision granting or denying the relief sought. The Secretary has adopted detailed regulations governing the processing of such petitions. 30 C.F.R. §§ 44.1-52. Multi-level review of a modification petition is provided; the initial decision being made by the Administrator of MSHA with the right to be heard by an administrative law judge of the Department of Labor and with an appeal to the Assistant Secretary of Labor. Only a decision of the Assistant Secretary is deemed final agency action for purposes of judicial review. 30 C.F.R. 44.51.

123 3 FMSHRC at 1398, 2 MSHC at 1357.
124 Id. at 1400, 2 MSHC at 1358.