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SOL (MSHA)  V.  COMMONWEALTH MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. KENT 81-74<br>Assessment Control<br>No. 15-12484-03001 |
| v. | |
| COMMONWEALTH MINING CO., INC.,<br>RESPONDENT | No. 1 Tipple |

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Templeman, President, Commonwealth Mining Co., Inc., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 4, 1981, as amended October 30, 1981, a hearing in the above-entitled proceeding was held on November 3, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 160-184):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed on March 5, 1981, by the Secretary of Labor in Docket No. KENT 81-74 alleging four violations of the mandatory safety standards by Commonwealth Mining Co., Inc. A hearing was held and, after testimony had been presented by petitioner and by respondent as to Citation No. 720668, respondent's representative stated that he had another commitment and that he would have time to present testimony only as to one other citation which is No. 947345. During a recess, respondent agreed to pay the full amount of $52.00 proposed by the Assessment Office with respect to two other citations. The result of the settlement as to two citations out of the four alleged by the Proposal for Assessment of Civil Penalty is that the contested aspect of this proceeding involves only two citatons. My bench decision will first deal with the two contested citations; the remaining part of my decision will approve the settlement agreed to by the parties.
>
> Contested Citations
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> Jurisdictional Issue. Respondent raised an issue as to

whether the citations involved in this proceeding were properly written with respect to facilities which are subject to the provisions of the Federal Mine Safety and Health Act of 1977. That issue pertains to all four of the citations even though a settlement was reached as to two of them because the settlement was based on the assumption that if I decide

the jurisdictional issue adversely to respondent that the other matters would be considered on the assumption that everything involved in this case is subject to the provisions of the Act. The facilities involved in this proceeding constituted a crushing and processing plant and loading facility for loading coal into railroad cars. The plant had been constructed just a few days before the inspection was made and, in fact, the inspectors wrote their citations on the day that the plant first engaged in a trial period of operation. Consequently, the plant had been run to produce only about a half railroad car of coal before it was shut down in order that the belts could be realigned on the conveyor. It was at that point in time that the citations were written, that is, while the plant was inoperative. It is respondent's position that since coal had neither been sold in interstate commerce or sold so as to affect interstate commerce at the time the citations were written, no jurisdiction should attach to the facilities here involved. Section 4 of the Act provides, with respect to jurisdiction, as follows: "[e]ach coal or other mine, the products of which enter commerce, or the operation 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."

The courts have held that when Congress uses the phrase "affecting commerce", that Congress intends for a statute written with that provision in it with respect to jurisdiction to be interpreted to the farthest possible reach of the commerce clause, and a court so stated in Secretary of Interior v. Shingara, 418 F. Supp. 693 (M.D.PA. 1976). In Ray Marshall v. Wade Kilgore, 478 F. Supp. 4 (E.D. TENN. 1979), the court stated that even activity which appears to be entirely intrastate commerce may be regulated where the activity affects commerce. In the Kilgore case, the court indicated the extent to which jurisdiction may be held to apply by citing the Supreme Court's opinion in Wickard v. Filburn, 317 U.S. 111 (1942), in which the Court held that wheat grown for one's own consumption had an effect on commerce because if sold in the market, it would affect the price of wheat, or if eaten, would affect the market because the grower of the wheat would not have to buy wheat. Since the commerce clause has been applied to a person who grows and eats his own wheat, it is certain that the commerce clause would apply to a facility from which coal is sold only in the intrastate market, as apparently was the case for the coal ultimately sold by respondent in this proceeding.

The real thrust of respondent's argument as to jurisdiction, however, is that until coal processed from its plant had actually been sold in interstate or intrastate commerce, no jurisdiction should attach to such facilities or coal. The obvious response to that argument is that independent contractors have been held subject to the jurisdiction of the Act, even though

they may construct a shaft or do other work in connection with a coal mine that has never sold any coal at the time they do their work and they may leave the premises and be gone for a month or two before any coal is sold. Yet, the courts have held that their activities and

their workers are subject to the provisions of the Act and that they can be cited for violations which were committed on mine property. (FOOTNOTE 1)

There is no merit to respondent's jurisdictional argument in this case based on the fact that the coal, which has been run through respondent's tipple and processing facilities, had not yet been sold to anyone at the time the citations were written. Obviously, the facilities had been constructed for the purpose of processing coal and the coal, even if ultimately used only in intrastate commerce, would have en affect on commerce and, therefore, be jurisdictional. The mere fact that the inspectors wrote the citations before such coal had started moving in intrastate commerce is immaterial. Therefore, I find that the facilities here in issue were jurisdictional and that all the citations written by the inspectors were properly issued to an operator which was subject to the jurisdiction of the Secretary of Labor and the Commission under the Act.

Citation No. 720668 dated 9/18/80, 77.701

I shall make some findings of fact with respect to Citation No. 720668 and they will be set forth in enumerated paragraphs.

1. On September 17, 1980, Inspector Martin C. Smallwood was at the No. 1 tipple of Commonwealth Mining Co., Inc., in order to inquire about the operator's training program and some other matters in contemplation that the facility being constructed would soon become operable. While Inspector Smallwood was there, respondent's President requested that the inspector come back the next day, if possible, and bring an electrical inspector with him so that the two inspectors could advise respondent's President as to whether his facility properly complied with the safety standards.

2. The next day, September 18, 1980, two inspectors, Smallwood and Waddles, appeared at the plant. Inspector Waddles is an electrical inspector and he wrote Citation No. 720668, or Exhibit 1, in this proceeding. In that citation, the inspector stated that the crusher plant was not provided with frame grounding for the respective metallic structures where electrical motors and circuits are located. The inspector considered the lack of frame grounding to be a violation of section 77.701 which provides "[m]etallic frames, casings, and other enclosures of electric equipment that can become "alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

3. The inspector testified that there was one grounding rod in the vicinity of the crusher plant. He was uncertain whether the grounding rod was actually attached to the crusher plant because his citation was written over a year before the testimony in this case was given and his

memory simply wasn't sufficiently perfect to enable him to be certain as to that point. The inspector said, however, that if one grounding point had been attached, and he had known it was attached at the time he wrote his citation, that he would not have written the citation with respect to the crusher plant. It is a fact, however, that the crushing plant was only part of the facility here because the crusher plant was also attached to a screening plant and the inspector said that there was no connection between the screening plant and the crushing plant which would have permitted him to find that the screening plant was properly grounded. Therefore, he stated that his citation had primarily been written because there was no interconnection between the crushing plant and the screening plant in the sense that a grounding conductor between the two facilities had actually been installed.

4. The inspector was asked several questions about whether the conveyor belt and its associated framework, which did pass from the crushing facility to the screening facility, would be sufficient to act as a ground, and he stated that it was possible that the metal framework on the crusher extending over to the screening facility might act as a ground in a given situation but that he could not, under the regulations, officially sanction the use of a metal framework on a conveyor belt as an adequate ground within the meaning of section 77.701.

5. The inspector was also asked by respondent's representative in this case if the radial stackers constituted a ground between the crushing facility and the screening facility and the inspector stated that he would not accept that as a grounding mechanism either; and, that he was not acquainted with the exact way that a radial stacker was constructed, but he still would not consider that to be an adequate ground for the purpose of meeting the provisions of section 77.701.

6. The alleged violation was abated rapidly because respondent sent one of its employees to obtain grounding rods and wire immediately after the citation was written and some of the grounds were installed on the same day the citation was written, that is, September 18, 1980; but there was not at the supply house sufficient wire to complete installation of all of the grounds on September 18 and the remainder were installed the following Monday, September 22. Therefore, respondent showed an effort to abate the violation as soon as possible and should be given full credit for that mitigating factor.

7. Counsel for the Secretary of Labor stated that since this was the first inspection made of the facilities of Commonwealth Mining Co., Inc., that no previous citation or alleged violations had been written with respect to Commonwealth Mining Co., Inc.;

consequently, there is no history of previous violations to be considered in this proceeding.

8. The facilities involved here were leased from another company and were installed by respondent. Only three employees, plus respondent's President, worked at the facility which never did process more than 500 tons of coal per day. The facility was not operated by respondent after

July 1981 and has now been removed from the premises where the facilities were located at the time the citations were written. On the basis of those facts, I find that respondent is a small operator and that insofar as penalties should be assessed under the criterion of the size of respondent's business, they should be in a low range of magnitude.

9. Respondent first introduced some exhibits with respect to the criterion of whether the payment of penalties would cause respondent to discontinue in business and respondent's representative later stated that he did not wish to avail himself of a defense insofar as respondent's financial condition is concerned; and, therefore, respondent's position in this case is that payment of penalties would not cause respondent to discontinue in business. Respondent is in business at the present time, in that it now operates a surface mining facility, but it is no longer the operator of the tipple which is involved in this proceeding.

10. Respondent's position in this proceeding is based on a combination of arguments and facts. First of all, respondent's testimony in this proceeding was to the effect that when the facilities here involved were moved from a location in the vicinity of Pikeville to the place in the vicinity of Whitesburg, where the facilities were operated at the time the citation was written, a single grounding rod had been attached to the crusher. When respondent reconstructed the facilities after moving them from Pikeville to Whitesburg, a single grounding rod was installed in the same manner that it existed at the previous Pikeville location.

11. Additionally, respondent's President testified that the radial stackers at the plant had been constructed by driving rods through a metal plate into the ground and then attaching the radial stackers to that metal plate, somewhat like a trailer is situated on the fifth wheel of a tractor. Respondent's position is that the radial stackers, plus the framework of the conveyor belt referred to in Finding No. 4 above, constituted a grounding mechanism or connection between the screening plant and the crusher. For abatement in this instance, the inspector required that six grounding rods be driven into the ground around the screening facility and that an additional five grounding rods be driven into the ground around the crushing facility.

Those nine findings constitute the necessary facts required for rendering a decision as to the parties' arguments.

I find that a violation of section 77.701 occurred. I

base that conclusion on the fact that the regulation here involved provided that the metal frames, casings and other enclosures of electrical equipment that could become "alive" through failure of insulation should be grounded by methods approved by an authorized representative of the Secretary. Respondent's argument that the facility, as it was installed in Pikeville, met all of the criteria of section 77.701 when it was used in Pikeville and then was cited for a violation under that same section after it was moved to Whitesburg, is not relevant when it comes to

determining whether there was a violation sufficient to bring about a possible hazard to people working at the plant.

There is no proof that the facility was inspected in Pikeville for compliance with the same section here involved. Different inspectors go to the different facilities and they each have certain points that they are trying to check for and they are not always uniform in their interpretation of the regulations. The important thing is that an inspector, in this instance, examined the facilities here involved after they were ready to operate in Whitesburg; and, as far as he was concerned, there was a possibility that the ground that was attached to the crusher was not sufficient to take care of the possible hazard of an "alive" frame or piece of equipment in the screening facility. Since he could not be certain that the metal radial stackers or metal frame on a conveyor belt was a proper ground, he legitimately came to the conclusion that a violation had occurred.

Respondent's other argument was that since respondent had provided a single grounding rod for the crusher that it had, at least, made a bona fide effort to ground the facility. That is a correct statement, and the inspector's having conceded that there probably was a single ground for the crusher, is sufficient to show that respondent was non-negligent in having, so far as it understood the provisions of section 77.701, tried to install a proper ground. In other words, respondent thought it was complying with section 77.701 until it found a different interpretation had been given to that section from the one that respondent had previously expected.

In UMWA v. Kleppe, 562 F.2d 1260, p. 1265, (D.C. Cir. 1977), the Court stated "[s]hould a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise to safety, the first should be preferred." In Secretary of Labor v. Ideal Basic Industries, Cement Division, 3 FMSHRC 843 (1981), the Commission stated that the primary goal of the regulations and of the Act is to prevent accidents and the Commission stated that the interpretation which gets closer to the occurrence of an accident before a correction is required is the one to be avoided.

In this instance, the inspector could have taken the position, as was apparently done in Pikeville that a special grounding facility was not required for the processing plant or to be placed between the two facilities. The inspector might have taken that position and then, there might have occurred an improper grounding situation in which someone might have been electrocuted. The inspector took a strict

approach to the effect that additional grounding was required here and I think that he should be upheld in that position. It is true that the inspector could have stated in his citation that there was not adequate grounding but, since the testimony shows that that is what the inspector intended, the factor of whether there was inadequate grounding or no grounding, can be taken into consideration in assessing the penalty and it is not a reason for vacating the citation or finding that no violation occurred.

Respondent has also pointed out that during his testimony, the inspector stated that there were methods for testing to see whether grounding is adequate but that the inspector did not make those tests in this instance. Respondent takes the position that the inspector's lack of testing prevents the inspector from being certain that respondent's single ground was inadequate. Inasmuch as there did not exist a connection between the crushing facility and the screening facility which could even be considered to be a proper ground, the inspector was within a proper interpretation of section 77.701 to say that he was issuing the citation primarily because of that lack of connection for the screening facility. Since there was not a proper ground between the two facilities, it was unnecessary for him to get into the question of what might have been adequate for the crusher because he thought that whatever safety that ground might have provided for the crusher, it was insufficient to make the installation safe as a total facility.

By way of summary, the violation of section 77.701 involves a small operator. There was no negligence on the part of respondent because it thought it had installed a satisfactory ground. The violation did not, at the time the inspector made his interpretation, involve a serious matter because he stated that he saw no poor insulation on any of the conductors or electrical facilities. Nevertheless, there existed a potential hazard to the extent of possible electrocution. Since electrocution still accounts for a lot of deaths in coal mines and related facilities, there was a cogent reason for this facility to be grounded properly. At the same time, the evidence fails to show that there was a hazard at the time the citation was issued. The operator showed a very rapid effort to achieve compliance by getting the necessary equipment and beginning the installation of the grounds within the same day. There is no history of previous violations. Consequently, a large penalty in this instance would be contrary to the six criteria which are required to be considered under section 110(i) of the Act. In such circumstances, I find that a penalty of $5 should be assessed.

Citation No. 947345, dated 9/18/80, 77.206(c)

A few findings of fact are required before a decision is rendered as to whether a violation occurred.

1. Inspector Smallwood issued Citation No. 947345 on the same day that the previous citation discussed above was written. That citation provides that vertical ladders at fixed locations were not provided with backguards which extended no more than 7 feet from the bottom of the ladder to the top of the ladder.

2. The inspector cited section 77.206(c) as having been violated and that Regulation reads as follows:

"[s]teep or vertical ladders which are used regularly at fixed locations shall be anchored securely and provided with backguards extending from a point not more than 7 feet from the bottom of the ladder to the top of the ladder."

3. In order to understand the factual situation with respect to the violation here involved, it is necessary to refer to a diagram which was introduced at the hearing as Exhibit 3. That exhibit shows that the fixed ladder involved was actually 6-1/2 feet tall and its bottom began 1-1/2 feet off the ground. The exhibit shows that the top of the ladder ended at the platform shown on the exhibit and a handrail is provided on the platform but the handrail is not a part of the ladder itself. The exhibit also shows that the bottom of the ladder was 1-1/2 feet off the ground.

4. The inspector took the position at the hearing that section 77.206(c) requires backguards to be installed if the height of a ladder is more than 7 feet. The inspector believed that the ladder here involved was more than 7 feet high because he measured the distance from the ground to the top of the ladder and found the space between the ground and the top of the ladder to be eight (8þ ) feet and he believed that the requirements of section 77.206(c) should be applied to any situation where the ladder was in a position enabling a person to climb it and be off the ground by more than 7 feet and he believed that the protection of the backguard was required in this instance if the height of the ladder, from the ground to the top, was an 8-foot distance even though the ladder itself only measured 6-1/2 feet.

I believe that those four findings are all that are needed for discussing whether a violation occurred because the violation depends on the interpretation which is given to the language of section 77.206(c). Respondent took the position at the hearing that the ladder did not require a backguard because it was only 6-1/2 feet long. Since it was less than 7 feet, respondent concluded that the section did not require a backguard on the ladder. Respondent's representative also believed that adding the 1-1/2 foot distance between the bottom of the ladder and the ground to obtain the ladder's true height was not appropriate within the meaning of the regulation because he said that there was no provision about the distance between the top of the ladder and the ground or any platform that might be beneath the ladder. He quoted section 77.206(c) to emphasize that the backguard should not be at a point more than 7 feet from the bottom of the ladder.

As I have previously indicated in making my conclusions with respect to the violation of section 77.701 discussed above, the courts and the Commission have emphasized interpretations to be given to the regulations which will promote safety. The interpretation which would promote safety in this instance is the inspector's interpretation and the interpretation urged by counsel for the Secretary. If

a ladder starts at a distance above the ground which can be reached by a person who lifts his or her foot to start the initial ascent of the ladder, then, at that point, the person taking the first step to the bottom of the ladder is already off the ground by 1-1/2 feet in this instance. It could just as easily be 2 feet in another case. By the time a person reaches the top of the ladder, he or she is 8 feet off the ground in this instance. If the 7 foot requirement for backguards were applied

on the assumption that a fall for a distance of 7 feet, or more, is likely to result in serious injury, then, obviously, anyone climbing a distance which is more than 7 feet off the ground would be exposed to a possible fall; therefore, the backguard should be required.

In this instance, the inspector allowed the operator to abate the violation by placing cinder blocks beneath the bottom of the ladder so as to make a platform from which a person would ascend the ladder. Obviously, if one brings the earth or the platform up to the bottom of the ladder, one eliminates a distance of 1-1/2 feet. Therefore, the ladder did not have to have backguards constructed at all because increasing the ground level below the ladder eliminated the possible fall of 7 feet or more. The inspector stated that although he had allowed abatement to be done in this instance by the construction of a cinder block platform beneath the ladder, he was not certain that that was the proper way to abate the citation.

Another argument which respondent's representative made in opposition to having to install backguards on a ladder which is only 6-1/2 feet long, is that he said there was a hinge point in the middle of the ladder which enabled the operator to raise the ladder for the purpose of cleaning beneath it. He stated that if one were to put a backguard on the ladder and it extended down past the hinge point, that the ladder would then be rendered rigid and could not be raised for cleaning purposes. The obvious reply to that argument is that the backguard can begin at a point not more than 7 feet from the bottom of the ladder. Therefore, the backguard could begin just above the center point of the ladder and provide protection for a person climbing the ladder and still allow the ladder to be raised for cleaning beneath it.

An additional argument relied upon by respondent is that the facility involved here had been previously installed in Pikeville and had been approved by MSHA as it was there installed and, that since it had been approved by MSHA as it existed in Pikeville, that is, using a 6-1/2 foot ladder which did not require a backguard, that it was improper for the inspector to cite a facility as being in violation of section 77.206(c), when, in fact, that facility had already been approved by MSHA. Respondent's representative claimed that he had checked with the company that constructed this facility with the 6-1/2 foot ladder on it and that the company told him that the ladders had been made 6-1/2 feet tall for the specific purpose of eliminating the need for the ladders to be equipped with backguards.

Whether or not the facility had previously been

approved by MSHA is not material when it comes to an interpretation of what section 77.206 means. As counsel for the Secretary has appropriately argued in this proceeding, the regulation still exists and if MSHA, in approving this facility, made an interpretation of that regulation which would bring about less protection than a correct interpretation would provide for miners, then the facility as it was installed needed to be modified to provide that protection by either raising the platform or ground beneath the ladder to a point that a person is not subjected to a fall

> of more than 7 feet, or by having the backguards installed, as required by section 77.206(c). Therefore, I find that a violation of section 77.206(c) occurred.
>
> In dealing with assessment of a penalty, the findings that have been given above with respect to several of the assessment criteria are applicable for this violation also. Respondent is a small operator. There is no history of previous violations. The work for abating the violation was commenced the same day that the violation was cited and was continued over a period of time until all of the ladders, of which there were four or five at both the screening plant and the crushing plant, were all modified to provide for abatement. Insofar as negligence is concerned, I think here again, respondent would have to be considered nonnegligent because respondent was relying on its interpretation of section 77.206(c) as well as the fact that it claims the facility had been approved by MSHA as it then existed and as it had been originally constructed. Insofar as gravity is concerned, it was just barely high enough to require a backguard, so any fall would have been at most from a height of 8 feet, but it still could have caused an injury which might have required several days of absence from work and, therefore, was at least moderately serious. Considering those findings as to the six criteria, I believe that a penalty of $10 should be assessed for this violation.

Settlement Agreement

As indicated in the opening paragraph of my bench decision, the parties entered into a settlement agreement with respect to two of the four violations for which civil penalties are sought in this proceeding (Tr. 103-104). Under the settlement agreement, respondent would pay the full amount proposed by the Assessment Office with respect to a violation of section 77.400 ($24.00) and a violation of section 77.205(b) ($28.00).

In determining whether the settlement agreement should be accepted, it is unnecessary to discuss three of the six assessment criteria because my bench decision already contains findings to the effect that respondent is a small operator, that payment of penalties will not cause it to discontinue in business, and that respondent has no history of previous violations.

The remaining three criteria of whether respondent demonstrated a good-faith effort to achieve rapid compliance, whether the violation were associated with negligence, and whether the violations exposed miners to serious or nonserious injury will be considered in evaluating each of the two alleged violations.

The first violation was alleged in Citation No. 947343 which

stated that respondent had violated section 77.400 by failing to provide a guard on the chain drive for the feeder under the raw coal hopper. The location of the chain drive was in a remote place where employees go only when they need to work on the equipment, so the likelihood of injury was reduced by the location of the

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chain drive. The violation was associated with ordinary negligence and a normal effort was made to achieve rapid compliance because respondent placed a guard on the chain drive within the time period given by the inspector. Inasmuch as a small operator is involved, it appears that the penalty of $24.00 proposed by the Assessment Office was reasonably determined and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

The second violation involved in the settlement agreement was a violation of section 77.205(b) alleged in Citation No. 947346 which stated that the travelways in and around the tipple were not kept free of extraneous material which constituted stumbling or slipping hazards. In the absence of any details as to the size and extent of the material which caused the stumbling or slipping hazards, it is difficult to evaluate respondent's negligence as well as the gravity of the stumbling or slipping hazards. The subsequent action sheet shows, however, that respondent cleaned up the extraneous material within the time allowed by the inspector. In view of the operator's small size, it appears that the Assessment Office appropriately proposed a penalty of $28.00 for this alleged violation of section 77.205(b) and that respondent's agreement to pay the full amount should be approved.

WHEREFORE, it is ordered:

(A) Respondent, within 30 days from the date of this decision, shall pay civil penalties of $15.00, of which an amount of $5.00 is assessed for the violation of section 77.701 alleged in Citation No. 720668 dated September 18, 1980, and of which the remaining amount of $10.00 is assessed for the violation of section 77.206(c) alleged in Citation No. 947345 dated September 18, 1980.

(B) The parties' oral request for approval of settlement is granted and the settlement agreement is approved.

(C) Pursuant to the settlement agreement, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $52.00 of which an amount of $24.00 is allocated to the violation of section 77.400 alleged in Citation No. 947343 dated September 18, 1980, and of which an amount of $28.00 is allocated to the violation of section 77.205(b) alleged in Citation No. 947346 dated September 18, 1980.

(D) The total amount due under paragraphs (A) and (C) above is $67.00.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

1 Bituminous Coal Operators' Assn. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977), and Association of

Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978).