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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 82-303 A.C. No. 46-01286-03089
v.	Beech Bottom Mine
WINDSOR POWER HOUSE COAL COMPANY, RESPONDENT	
PRICE RIVER COAL COMPANY, RESPONDENT	Docket No. WEST 83-2 A.C. No. 42-00165-03504 Price River No. 3 Mine
WINDSOR POWER HOUSE COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS Docket No. WEVA 82-243-R Citation No. 860872; 3/29/82
	Beech Bottom Mine
PRICE RIVER COAL COMPANY, CONTESTANT	Docket No. WEST 82-166-R Citation No. 1129455; 4/16/82
	Price River No. 3 Mine
SOUTHERN OHIO COAL COMPANY, CONTESTANT	Docket No. LAKE 82-76-R Citation No. 1120486; 4/8/82
v.	Meigs No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
UNITED MINE WORKERS OF AMERICA, INTERVENOR	

DECISION

Before: Judge Kennedy

The captioned review-penalty proceedings were before me on the parties' cross motions for summary decision at the time the Supreme Court denied certiorari in UMWA v. FMSHRC, 671 F.2d 615 (D.C.Cir.), cert. denied 459 U.S. 927 (1982).

Shortly thereafter the case of Secretary v. SOCCO, FMSHRC Docket No. LAKE 80-142 (SOCCO I) was assigned to this trial judge under an order from the Court of Appeals to dispose of the matter in a manner "not inconsistent with its decision" and adjudication in UMWA v. FMSHRC, supra. Order in No. 81-2299 (D.C.Cir., April 27, 1982). The limited nature of the remand was underscored by the Commission which directed the case to the trial judge for "further proceedings consistent with the court's order." (FOOTNOTE 1) 4 FMSHRC 456 (1982).

Despite the clarity of these directions, the operator (SOCCO) filed a motion, after remand, for summary decision invoking the doctrine of administrative nonacquiesence and urging the trial judge ignore the court of appeals and the Commission and to make a de novo review of the matter. (FOOTNOTE 2) SOCCO I, 5 FMSHRC 479 (1983).

The Secretary and the Union contended that "law of the case" principles precluded reconsideration of the question of law decided by the court of appeals and I agreed. Ibid.

The Commission, over the objection of then Chairman Collyer, denied discretionary review, whereupon SOCCO petitioned

for review in the Sixth Circuit. (FOOTNOTE 3) Thereafter, the Sixth Circuit transferred the appeal to the D.C. Circuit, largely because of the remand order. Southern Ohio Coal Company v. FMSHRC, Order in No. 83-3346 (September 22, 1983). By its memorandum decision and order of June 14, 1984, the court of appeals for the D.C. Circuit granted the government's and the Union's motion for summary affirmance of the trial judge's decision. The court held that "SOCCO'S persistent attempt to avoid UMW v. FMSHRC was clearly futile and frivolous." Southern Ohio Coal Company v. FMSHRC No. 83-2046 Slip Op. at 3. Subsequently, the Court of Appeals awarded attorney fees in the amount of $1,964.00 to the Secretary. Southern Ohio Coal Co. v. Secretary, et al. (Order of August 27, 1984).

The avowed purpose of this further litigation of the walkaround pay issue is to produce, if possible, a split in the circuits that will afford the mining industry a further opportunity to seek review of the D.C. Circuit's interpretation of section 103(f) by the Supreme Court. These particular proceedings brought by SOCCO and its affiliated corporations, Windsor Power House Coal Company and Price River Coal Company are designed to posit the walkaround pay issue for review in the Fourth, Sixth, and Tenth Circuits. Other operators have proceeded along parallel lines in the Third and Seventh Circuits in what appears to be a program of massive resistence by the industry to the walkaround pay provisions of the Mine Act. The effort, to date, has been singularly unsuccessful but demonstrates the power of corporate America to tie the administrative and judicial systems up for years in repetitious relitigation.

While no one presently contends that the after-tax cost of walkaround pay for spot inspections outweighs the socio-economic benefits, the industry's dogged pursuit of the issue reflects not only a concern with cost but also its view that it is fundamentally unfair to require an operator to pay miners to assist federal inspectors to police an operator's mining practices. Rightly or wrongly, the industry views section 103(f) as an unwarranted intrusion into management's

control over working conditions. Furnishing miners with a tool for monitoring safety practices in a manner that is largely independent not only of management but also of MSHA raises concerns of seismic proportions. (FOOTNOTE 4) When the 103(f) authority to inspect is coupled with the aggressive use of the miners' authority to oversight MSHA's enforcement activity conferred by section 103(g)(1), (2), the miners are provided a self help mechanism that, properly employed, can do much to redress the present imbalance in vigorous enforcement that flows from MSHA's policy of nonadversarial policing of the mandatory health and safety standards. The teaching of bitter experience--an experience of which Congress was well aware--is that miners' involvement through participation in spot inspections is vital to an effective enforcement scheme, especially in an era of stringent budgetary constraints on federal enforcement activity.

It is axiomatic that the cost of safety directly affects the cost of production. The temptation to minimize compliance with the safety standards and thus shave costs is ever present and magnified in times of economically depressed markets. To offset this temptation, the D.C. Circuit has recognized that "The miners are both the most interested in health and safety protection, and in the best position to observe compliance or noncompliance with the mine safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance." Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 778 (D.C.Cir.1974), cert. denied 420 U.S. 938.

The regrettable result of MSHA's emasculation of the federal enforcement effort is that death and disabling injuries are on the rise in the nation's mines. Public perception of working conditions in the mines was accurately depicted in a series that ran in the Louisville Courier-Journal in May 1982. In a summary of its findings, the paper's managing editor concluded that "in spite of repeated attempts at reform, coal remains an outlaw industry--operating outside the normal restraints that apply to other American enterprises." "Dying for Coal," An American Tragedy, Reprint December 1982 of a series that ran from May 2 to May 10, 1982 in The Courier-Journal, Louisville, Kentucky. In an editorial published on July 11, 1984, the Courier-Journal noted that "Mine inspectors who hear more talk from the higherups about "cooperation' with safety

law violators than about firmness are likely to feel that safety isn't the first order of business."

The legislative history of section 103(f) shows these public perceptions moved Congress to provide for walkaround pay when it amended the Mine Safety Law in 1977. In 1982, the D.C. Circuit held the participation and pay rights were coextensive and included spot inspections. Recently the Third and Seventh Circuits agreed. The time is ripe, therefore, for disposition of these matters.

I

SOCCO II--Docket LAKE 82-76-R

On March 30, 1982, a contract miner participated in the physical inspection of the Meigs No. 1 Mine for the purpose of determining compliance with the provisions of the mandatory safety standards relating to the control, suppression and removal of excessive accumulations of explosive and noxious gasses. This spot inspection for extrahazardous conditions was accomplished under the authority of sections 103(a)(3), (4), and (i) of the Mine Act. When the operator refused to pay the walkaround pay mandated by section 103(f), a federal mine inspector issued a 104(a) citation. The citation was abated when the operator paid the miner for the time spent in participating in the 103(i) spot inspection. Thereafter, the operator filed a timely notice of contest of the citation claiming section 103(f) of the Act does not provide for compensation of miners' representatives who accompany MSHA inspectors during spot inspections.

The Union challenges SOCCO's right to review on the ground that payment of the penalty assessed, $20, mooted the issues contested and requires dismissal of the review proceeding. I find it unnecessary to address this question because I find SOCCO's challenge is barred by its prior litigation of the identical legal issue in SOCCO I, supra.

There is no merit to SOCCO's claim that collateral estoppel does not apply to "unmixed" or pure questions of law. Restatement (Second) Judgments 27, 28 (1982). While it is true that issue preclusion has never been applied to issues of law with the same rigor as issues of fact, it is today well settled that issue preclusion applies to "issues of law and issues of fact if those issues were conclusively determined in a prior action." United States v. Stauffer, 78 LEd. 388, 393 (1984); United States v. Mendoza, 78 LEd. 379, 383-384 (1984); Montana v. United States, 440 U.S. 147, 153 (1979); Carr v. District of Columbia, 646 F.2d 599, 608 (D.C.Cir.1980).

Nor are the factual difference between this case and SOCCO I of any significance. Here as in Stauffer and Montana, supra, the separable facts exception is inapplicable. Where there is a close alignment of time and subject matter between two violations so that they stem "from virtually identical facts" relitigation of a question of law predicated on those facts is precluded. United States v. Stauffer, supra at 393-394; Montana v. United States, supra at 162-163. The underlying policy considerations are well stated in the Restatement:

> When the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of "law." Restatement (Second) Judgments 28 comment b (1982).

Where, as here, there is an identity of parties and legal issues and where, as here, SOCCO has twice had a full and fair opportunity to litigate the right of a miner to walkaround pay, I find accepted principles of issue preclusion, whether characterized as res judicata or collateral, estoppel operate to bar further redundant litigation by SOCCO of the controlling question of law involved. I further find that even if principles of issue preclusion were inappliable relitigation or reconsideration of the question of law presented is foreclosed by the doctrine of stare decisis or controlling precedent. UMWA v. FMSHRC, supra; Consolidation Coal Company v. FMSHRC, No. 83-3463 (3d Cir. August 13, 1984); Monterey Coal Company v. FMSHRC, No. 83-2651 (7th Cir. September 14, 1984).

Accordingly, I find SOCCO's challenge to the instant citation must be denied.

II

SOCCO's Affiliates

On March 29, 1982, a contract miner participated in a spot physical inspection of Windsor Power's Beech Bottom Mine for the purpose of determining whether a violation of the Mine

Act or a mandatory health or safety standard existed. (FOOTNOTE 5) When the operator refused to compensate the walkaround for his time, a federal mine inspector issued a 104(a) citation for a violation of section 103(f) and a penalty of $84 was proposed.

On March 31, 1982, a contract miner participated in a spot physical inspection of Price River's No. 3 Mine for the purpose of determining compliance with the mandatory safety standards relating to the control, suppression and removal of explosive and noxious gasses. (FOOTNOTE 6) This inspection was accomplished under the authority of section 103(i) of the Mine Act. When the operator refused to compensate the walkaround for his time, a federal mine inspector issued a 104(a) citation for a violation of section 103(f) and a penalty of $20 was proposed.

There is no dispute about the fact that both inspections were compliance or enforcement inspections conducted pursuant to the authority of section 103(a)(3) and (4) of the Mine Act. UMW v. FMSHRC, supra, at 623-624, nn. 27, 28. It is also conceded that both inspections were spot inspections that were not part of a regular inspection. Although not defined in the statute the accepted understanding is that a "regular" inspection is one of the four complete inspections required each year under section 103(a). In addition to these "regular" inspections of the entire mine, the Secretary is authorized to conduct "spot" inspections. (FOOTNOTE 7) These inspections are more limited in scope and purpose. See 43 Fed.Reg. 17547 (1978). Typically they involve the physical inspection of a particular area or problem in the mine and usually focus on one or more types of safety or health hazards such as electrical, roof control, ventilation, haulage or respirable dust control. Under section 103(i), spot inspections are required to be conducted with a certain frequency at mines which liberate

excessive amounts of methane or have other extrahazardous conditions. Spot inspections may also be triggered by a miner's complaint of a hazardous condition under section 103(g) of the Act. Sections 202(g) and 303(x) also provide for inspections for the purpose of determining compliance with the respirable dust standards and with all the safety and health standards in the case of newly reopened mines.

Windsor and Price River, filed timely challenges to both the validity of the citations and the penalty assessments. The ground asserted was that previously litigated by their affiliate, SOCCO, namely whether section 103(f) of the Mine Act requires an operator to pay a walkaround for the time spent in participating in a spot inspection.

Windsor and Price River are together with SOCCO wholly owned subsidiaries of two public utility operating companies, Ohio Power Company and Indiana and Michigan Electric Company. The operating companies are in turn wholly owned subsidiaries of American Electric Power Company (AEP), a public utility holding company. The AEP Companies operate approximately thirty underground and surface coal mines throughout the United States. They provide service to residential and industrial utility customers in a seven state region. As a group the AEP Companies constitute one of the largest coal producers in the United States, and the American Electric Power System is the largest user of coal in the United States. Because of the cost and labor relations considerations involved, the AEP Companies have been in the forefront of the industry's efforts to limit the scope of the walkaround pay and self-help policing provisions of the Mine Act.

Under the control and direction of counsel for the AEP Companies, SOCCO has twice previously litigated through the Commission and the United States Court of Appeals for the District of Columbia Circuit the precise issue presented in these proceedings by Windsor and Price River. SOCCO I, supra. Because of the substantial identity of interest of AEP and its three subsidiaries with respect to the controlling issue of law twice previously decided adversely to SOCCO, the Secretary and the UMWA claim Windsor and Price River are estopped either as parties or privies, or both, to relitigate the issue decided in SOCCO I.

In response, Windsor and Price River, without admitting or denying there is a sufficient identity of interest to create an estoppel or that the AEP Companies have had a full and fair opportunity to litigate the controlling question of statutory interpretation, urge that as a matter of policy

collateral estoppel (issue preclusion) should never be invoked to preclude relitigation across the circuits of a legal issue of national import or with substantial public policy implications. See American Med. Intern. v. Sec. of HEW, 677 F.2d 118, 121-124 (D.C.Cir.1981).

In the wake of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) offensive, as well as defensive, collateral estoppel is available to protect litigants from the burden of relitigating an identical issue with the same party or his privies. (FOOTNOTE 8) Id. at 326. Consequently, where a right, or question of fact or law is distinctly put in issue and directly determined by a court of competent jurisdiction a party or his privy is collaterally estopped from relitigating the issue in a subsequent action. The fact that the parties are not precisely identical is not fatal to the assertion of issue preclusion. A judgment is "res judicata in a second action upon the same claim between the same parties or those in privity with them." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940).

But while Parklane made the doctrine of mutuality a dead letter under the federal law of collateral estoppel, the case left undisturbed the requisite of privity, i.e., that collateral estoppel can only be applied against parties who have had a prior "full and fair" opportunity to litigate their claims. 439 U.S. at 332. The right to a full and fair opportunity to litigate an issue is, of course, protected by the due process clause of the Constitution. Blonder-Tongue Labs, Inc. v. Univ. of Illinois Foundation, 402 U.S. 313, 329 (1971). To ensure that nonparty preclusion comports with the Constitution federal courts have established guidelines for application of res judicata and collateral estoppel to non-parties. Foremost among these is that the question should be approached on a case-by-case basis, looking at the "practical realities" of individual litigation. Butler v. Stover Bros.

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Trucking Co., 546 F.2d 544, 551 (7th Cir.1977); Carr v. District of Columbia, 646 F.2d 599, 605 (D.C.Cir.1980). It is also pertinent to observe that the burden of avoiding nonmutual preclusion is on the party who asserts lack of a full and fair opportunity to litigate in the first action. 18 Wright-Cooper-Miller, Federal Practice and Procedure 4465, p. 592 (1981).

Several types of corporate relationships are considered sufficiently close to justify preclusion by privity. Among these is an unrebutted showing that a nonparty parent such as AEP who presumably financed and certainly controlled much of the SOCCO I litigation has also financed and controlled the instant litigation by Windsor and Price River. See United States v. Montana, 440 U.S. 147, 158-162 (1979). Although subsidiaries are not in privity with their parent merely by virtue of complete ownership other factors may establish the privity necessary to support an assertion of claim preclusion. Thus, where, as here, the undisputed facts show that AEP not only controlled the prior litigation but has been represented in both by the same corporate or in-house counsel who dominated and controlled both litigations it is appropriate to find the necessary privity. IT & T v. General Tel. & Electronics Corp., 380 F.Supp. 976, 982-984 (D.N.C.) remanded on other grounds 527 F.2d 1162 (4th Cir.1975). Further, I find that in view of the commonality, if not identity, of financial and proprietary interests of the AEP Companies in the walkaround pay issue and the control over the legal strategy exercised by AEP's corporate counsel, nonparty preclusion with respect to Windsor and Price River is appropriate. In IT & T, supra, the court held that, "If identity of interest were the sole criteria in determining privity, the Court would have no hesitancy in finding that the subsidiaries to be sufficiently represented by GTE to be in privity with it" in the prior action. Id. at 982. Especially pertinent to this case was the court's finding that "Privity may be established by showing that a person was represented in a prior action by a dominant personality, as well as by showing that the person actually controlled the prior action." Ibid.

The record shows the walkaround pay issue is one common to the corporate business of all the AEP Companies. Consequently, when AEP undertook to litigate the walkaround issue through SOCCO it undertook an action that affected the entire corporate business of the AEP Companies. As the holding company, there is no doubt that AEP has substantially dominated, directed and controlled all of the AEP Companies' walkaround litigation. That a subsidiary corporation is in privity with its parent with respect to the common corporate business is well settled. Jefferson School of Social Science v. SACB, 331 F.2d 76, 83 (D.C.Cir.1963).

Another test of the propriety of nonparty preclusion is whether the interest of the nonparties, Windsor and Price River, was adequately represented by AEP and SOCCO in the prior litigation. I find that it was.

The record in the SOCCO I litigation and this litigation conclusively demonstrates that corporate counsel for the AEP Companies employed outside counsel in these cases to present the same arguments in favor of bifurcation of the walkaround rights as were presented to the Commission and the Court of Appeals in the original SOCCO and Helen Mining matters. While those arguments and proofs did not prevail, there is no suggestion that the failure was due to any lack of incentive or competence in their presentation.

Finally, the record shows that Windsor and Price River could have intervened and fully participated in the prior litigation as well as that the AEP Companies had full control over the resources necessary to permit them to exhaust their opportunities for appeal and to petition for certiorari in the prior litigation. Restatement (Second) Judgments 39 comment c (1982); Motion of AEP Companies to file Amicus Brief and Amicus Brief in Support of Petition for Certiorari in Helen Mining Company, et al. v. Donovan and UMWA, Supreme Court Docket No. 82-33, October Term 1982, filed September 9, 1982.

Under the circumstances, I find it fair and just to preclude AEP and its affiliates, Windsor and Price River, from relitigating further the spot inspection-walkaround issue.(FOOTNOTE 9) Pan American Match Inc. v. Sears Roebuck & Company, 454 F.2d 871, 874 (1st Cir.), cert. denied 409 U.S. 892 (1972) (judgment in action in which wholly owned subsidiary was a party binding on parent where it was aware of the litigation and participated in the defense); Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 961 (5th Cir.1968); Restatement (Second) Judgments 59(3) comment e (a controlling owner such as a parent corporation ordinarily has full opportunity and adequate incentive to litigate issues commonly affecting it and its

subsidiaries especially where it is a single enterprise entity operating under a multiple legal form).

The federal law of res judicata and collateral estoppel holds a person may be bound by a judgment or administrative adjudication (FOOTNOTE 10) even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative. In the present context it is apparent that Windsor and Price River had a substantial identity of interest and therefore privity with AEP and SOCCO in the first litigation of the spot inspection-walkaround issue. Further since AEP and SOCCO were responsible for protecting the beneficial interest of Windsor and Price River in the single enterprise entity's common interest in avoiding liability for walkaround pay it is appropriate to apply the principles of collateral estoppel to their attempt to relitigate the issue. Restatement (Second) Judgments comment c; Aerojet-General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir.1975); Lawlor v. National Screen Service Corporation, 349 U.S. 322, 329 n. 19 (1955); Chicago, R.I. Ry. Co. v. Schendel, 270 U.S. 611 (1926); Sea-Land Services v. Gaudet, 414 U.S. 573 (1974). (FOOTNOTE 11)

The doctrinal and conceptual basis for the virtual representation doctrine is that:

> Society allows a reasonable adjustment of the demands of due process. Thus an individual apparently can be held by a prior adjudication so long as his interests were adequately represented in the prior suit. The concept of preclusion against a nonparty is strikingly similar to the class suit in that if there is adequate representation of the interests of the nonparty he can be bound by the judgment in the earlier suit. The interest of society in preventing unnecessary duplicative litigation is closely akin to the interest of society--the expedient

> administration of justice--which was urged for the use of the class suit. Vestal, Res Judicata/Preclusion: Expansion, 47 So.Cal.L.Rev. 357, 378-379 (1974).

See also, Note, Collateral Estoppel of Nonparties, 87 Harv.L.Rev. 1485, 1502 (1974), which suggests that parties' apparent tactical maneuvering to create multiple opportunities to prevail upon the same issue justifies giving less weight to a litigant's attempt to manipulate due process concerns in order to relitigate.

I conclude that in view of the parent-subsidiary relationship between and among the AEP Companies, the control exercised by the parent AEP over the prior litigation, and the identity and commonality of interest both financial and proprietary of the entire AEP enterprise entity in the walkaround issue, the AEP Companies have had a full and fair opportunity to litigate that issue both directly and vicariously. For these reasons, I reject the suggestion that Windsor and Price River be permitted to relitigate the walkaround issue previously determined in SOCCO I.

With respect to the claim that application of the doctrine of collateral estoppel would, in this case, violate the policy against freezing important questions of law on the basis of a single circuit's interpretation, I note that the Supreme Court has recently held that while the presence of such a question does preclude the use of nonmutual estoppel against the government, it may be employed against a private party. United States v. Mendoza, 78 LEd 379, 386-387 (1984). In Mendoza, the Court confirmed that while its expanded concept of nonmutual offensive estoppel is fully applicable to disputes between private parties or between private parties and the government where the government prevails, it is for reasons peculiar to government litigation not applicable where the government loses the first suit.

Thus the Court found that while "no significant harm flows from enforcing a rule that affords a [private] litigant only one full and fair opportunity to litigate an issue" nonmutual estoppel in cases where the government does not prevail "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several court of appeals to explore a difficult question before this Court grants certiorari." Id. at 384, 385. With respect to the lack of symmetry of such a rule, the Court cited its earlier decision in Standefer v. United States, 447 U.S. 10 (1980) where it

held that "While symmetry of results may be intellectually satisfying, it is not required. (FOOTNOTE 12) Id. at 25.

The asymmetrical rule with respect to nonmutual estoppel does not apply however to cases where a private party seeks to preclude relitigation by invoking the principle of mutual defensive estoppel against the government. In United States v. Stauffer Chemical Co., 78 LEd 388 (1984), the Court held that Stauffer Chemical could prevent the EPA from relitigating a question of law of nationwide application with Stauffer. Application of an estoppel against the government in a case where it is litigating the same issue with the same party avoids the problem of freezing development of the law since the government is free to litigate the same issue in the future with other litigants. Id. at 395; United States v. Mendoza, supra, at 387. Accord: Continental Can Co. v. Marshall, 603 F.2d 590 (7th Cir.1979).

I conclude, therefore, that the operators assertion that nonmutual estoppel, whether offensive or defensive, may not be applied to preclude relitigation by Windsor or Price River of the spot inspection-walkaround pay issue is without merit.

Finally, the operators contend that under the doctrine of administrative nonacquiesence the trial judge should decline to follow the decision of the D.C. Circuit in UMWA v. FMSHRC, supra because it is patently erroneous. (FOOTNOTE 13)

I accept for the purposes of deciding this issue that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. courts of appeals that conflict with those of the agency. S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273, 1278-1279 (5th Cir.1981). (FOOTNOTE 14) Even so, the Commission has not opted to declare its nonacquiesence in the D.C. Circuit's interpretation of the walkaround pay provision. In remanding Helen Mining, SOCCO and the other walkaround decisions the Commission explicitly directed that they be disposed of in a manner consistent with the D.C. Circuit's interpretation. 4 FMSHRC 856 (1982). Since then the Commission has repeatedly declined to revisit the issue.

Moreover, if I were free to "nonacquiesce" in the decision of the D.C. Circuit I would not do so. As my decisions show, I have from the beginning firmly adhered to the position enunciated by the D.C. Circuit. Further, my confidence that the result reached was, and is, correct has been reinforced by recent decisions of the Third and Seventh Circuits, supra. Both stare decisis and collateral estoppel are, in part, reflections of confidence in the correctness of a prior decision. At this juncture my confidence in the correctness of the D.C. Circuit's decision is close to absolute. (FOOTNOTE 15) Any doubts as to the application of mutual or nonmutual collateral estoppel against Windsor and Price River, which are located in circuits that have not passed on the reach of the walkaround pay provision, are, of course, resolved by

application of the principle of state decisis. See United States v. Stauffer Chemical Co., supra, (reliance on stare decisis is no more burdensome than reliance on collateral estoppel where refusal of preclusion is dictated by considations of evenhanded application of the law to different parties similarly situated).

With respect to the claim that inquiry by other, as yet uncommitted, circuits should not only not be foreclosed but should be encouraged, I am constrained to point out that since these cases arose two other circuits have announced their agreement with the D.C. Circuit. Thus, in August 1984, the Third Circuit upheld an ALJ's decision against Consolidation Coal Company that assessed a penalty of $100 for a violation of the walkaround provisions of section 103(f). There the court stated:

> We find ourselves in agreement with the District of Columbia Court--that spot inspections of the type challenged here are authorized by and made "pursuant to subsection 103(a)." The narrow reading urged by the company is inconsistent with the declared intent of Congress to promote safety in the mines and encourage miner participation in that effort. See Magna Copper Company v. Secretary of Labor, 645 F.2d 694, 697 (9th Cir.1981).

The Court also rejected the suggestion that the interpretation of subsection 103(f) by the late Congressman Perkins should be considered controlling. Consolidation Coal Company v. FMSHRC, No. 83-3463, decided August 13, 1984, Slip Op. at 6-7.

In September 1984, the Seventh Circuit after a comprehensive review of the identical issue declined Monterey Coal Company's invitation to disagree with the D.C. Circuit and upheld an ALJ's decision that followed that of the D.C. Circuit. In concluding that miners "walkaround pay rights" are coextensive with their "participation rights" the court held (1) that all spot compliance or enforcement inspections create walkaround pay rights and (2) that the late Congressman Perkins' remarks to the contrary cannot be given decisive weight. Addressing the latter, the court, after an exhaustive and conscientious review of the possible motive and reasons for Mr. Perkins' otherwise inexplicable action stated it agreed with the D.C. Circuit's conclusion which was that the

Congressman's remarks were inspired by a desire to provide in the legislative history a basis for undermining in the courts what the miners had won from Congress. A more charitable view is that Congressman Perkins, an acknowledged master of the legislative compromise, inserted the spurious legislative history as part of a political tradeoff for industry support for the Black Lung Benefits Reform Act of 1977.

In conclusion, it appears that events have overtaken all of the operators arguments. Consequently, whether they are rejected on the ground of collateral estoppel and issue preclusion or under the rubrics applicable to res judicata or stare decisis makes little practical difference at this time. Needless to say, even if this trial judge were to revisit the walkaround pay issue de novo he would once again conclude that section 103(f) of the Mine Act provides for compensation to miners who participate in spot safety and health inspections. I find, therefore, that the violations charged did, in fact, occur.

Turning to the amounts of the penalties warranted for the violations found, I conclude, after considering the applicable statutory criteria, that because the operator's actions were (1) knowing and (2) constituted a repetitive and deliberate flouting of the law the penalties best calulated to deter future violations and encourage voluntary compliance are $500 each for the two penalty cases that are before me.

Accordingly, it is ORDERED that the three challenges to the validity of the citations in question be, and hereby are, DENIED. It is FURTHER ORDERED that for the two violations found the operator pay a total penalty of $1,000 on or before Friday, January 25, 1985, and that subject to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE
1 SOCCO I had been before the court of appeals on a petition by the Secretary and the UMWA for review of a trial judge's decision that followed the Commission's narrow interpretation of the walkaround pay provision in Helen Mining, et al., 1 FMSHRC 1796 (1979). See Secretary v. SOCCO, 3 FMSHRC 2531 (1981).

~FOOTNOTE_TWO
2 The phrase "de novo" means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. United States v. Raddatz, 447 U.S. 667, 690 (1980) (dissenting opinion). At the same time, the operator made clear that its request for nonacquiesence and a de novo review ran only one way. It did not extend, the operator asserted, to the point of permitting the trial judge to disagree with the Commission's Helen Mining decision. As to the latter, the operator claimed that the trial judge was bound to follow

Helen Mining. This Catch-22 presented not only an ethical but also a doctrinal problem as the trial judge's earlier decision on the walkaround pay provision had disagreed with that of the Commission in Helen Mining and been affirmed by the court of appeals. Secretary v. Allied Chemical Corporation, 1 FMSHRC 1451 (1979), reversed 1 FMSHRC 1947 (1979), reinstated 671 F.2d 615 (1982).

~FOOTNOTE_THREE

3 At this point, action on these matters was stayed pending resolution of the correctness of the trial judge's decision in SOCCO I. The wisdom of allowing the issues presented to mature through full consideration by the courts of appeals was subsequently confirmed. By eliminating subsidiary arguments, the Third and Seventh Circuits have vastly simplified my task and affirmed the reasonableness of the view I believe must ultimately prevail.

~FOOTNOTE_FOUR

4 See Cost/Benefit Analysis of Deep Mine Federal Safety Legislation and Enforcement, Consolidation Coal Company, December 1980, at 95. This study recommends outright repeal of miners' rights to participate in safety inspections.

~FOOTNOTE_FIVE

5 Docket Nos. WEVA 82-243-R and 82-303. This inspection was initiated by a code-a-phone (hotline) complaint. See section 103(g)(1), (2) of the Act, 30 C.F.R. Part 43.

~FOOTNOTE_SIX

6 Docket Nos. WEST 82-166-R and 83-2.

~FOOTNOTE_SEVEN

7 Section 103(a) provides the general authority for all physical inspections of mines. In addition to the four regular inspections, it directs the Secretary to make "frequent inspections and investigations" for the purpose of "(3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or other requirements of this Act."

~FOOTNOTE_EIGHT

8 Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Parklane Hosiery, supra, at 326, n. 4.

~FOOTNOTE_NINE

9 In United States v. Montana, supra, the Court observed that all the policy considerations that underlie res judicata and collateral estoppel "are . . . implicated when nonparties assume control over litigation in which they have a direct

financial or proprietary interest." It further noted that it is inaccurate to refer to the principle of nonparty preclusion as a matter of "privity" where, as here, a nonparty like AEP has taken a "laboring oar" in the conduct of the earlier litigation. Such circumstances, the Court held, actuate all the principles of party estoppel. 440 U.S. at 154-155.

~FOOTNOTE_TEN
10 The same policy reasons that underlie use of collateral estoppel in judicial proceedings are equally applicable when an administrative agency acts as an adjudicatory body. Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir.1981); Restatement (Second) Judgments 83 (1982).

~FOOTNOTE_ELEVEN
11 In Performance Plus Fund, Ltd. v. Winfield & Co., 443 F.Supp. 1188, 1191 (D.Calif.1977), commonality of interest and common control of formally separate parties was invoked in applying the virtual representation doctrine.

~FOOTNOTE_TWELVE
12 In American Med. Intern. v. Sec. of HEW, supra, relied upon by Windsor and Price River, the D.C. Circuit recognized the lack of symmetry in the rule. It noted: "If private parties can litigate the issue between themselves, the law cannot be frozen by a single ruling, for they will not be bound by prior adjudications with which they were not associated. Furthermore, the governmental unit must have lost the first case presenting the question; for if it won the first but loses subsequently, it is sheltered by Parklane's caveat on inconsistent prior decisions." 677 F.2d at 121 n. 24. Compare Jack Faucett Associates, Inc. v. AT & T, No. 83-1735, D.C.Cir. September 11, 1984, Slip Op. at 22-23.

~FOOTNOTE_THIRTEEN
13 The operators have not suggested that an agency may use a policy of nonacquiesence to avoid application of nonmutual preclusion within a circuit. The adoption of such a policy by the Department of Health and Human Services with respect to disability benefit cases arising under Titles II and XVI of the Social Security Act has been the subject of much debate. See, Legislative History, Social Security Disability Benefits Reform Act of 1984, Congressional Record for September 19, 1984, Conference Report, at H9831.

~FOOTNOTE_FOURTEEN
14 Chief Judge Godbold's opinion, "assumed without deciding that the Commission is free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits." Other circuits have not been so generous. Ithaca College v. NLRB, 623 F.2d 424 (2d Cir.) cert. denied 449 U.S. 975 (1980); Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir.1979); Mary Thompson Hospital, Inc. v. NLRB, 621 F.2d 858 (7th Cir.1980); Yellow Taxi Company of Minneapolis v. NLRB, 721 F.2d 366 (D.C.Cir.1984); NLRB v. HMO Int'l, 678 F.2d 806 (9th Cir.1982); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir.1979).

~FOOTNOTE_FIFTEEN

15 In passing, I note that the Solicitor General has taken the position that the Supreme Court's decision in United States v. Mendoza, supra, furnishes support for the view that intra-circuit nonacquiesence is constitutionally sound, except to the extent that application of such nonacquiesence would contravene the doctrines of res judicata or mutual offensive or defensive collateral estoppel. Ltr. of May 7, 1984 from Rex Lee to Senator Dole, Chairman, Senate Finance Committee (reprinted in Congressional Record for September 19, 1984, S11454-55). Compare United States v. Estate of Donnelly, 397 U.S. 286, 294-295 (1970).