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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

MIDCONTINENT RESOURCES, INC.,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. WEST 89-3-R  
Order No. 3077666; 9/23/88

Dutch Creek Mine  
Mine ID 05-00301

ORDER

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

MidContinent Resources, Inc. (MidContinent) has contested a 104(d)(2) order issued under the Act. The Order, No. 3077666, alleges MidContinent violated 30 C.F.R. 75.1704. (Footnote 1)

The order alleged the following condition:

The intake air escapeway was not maintained in a safe travelable condition. Part of the escapeway has heavy roof problems, however, it is supported by truss bolts, resin bolts, some 6" x 6" timber and 3 cribs. The bottom has heaved for approximately 800 feet causing problems in traveling or moving disabled persons quickly to the surface in the event of an emergency. The travelway needs to be cleaned with equipment to make it safe.

In addition to its contest of Order No. 3077666 MidÄContinent further alleged that the order is part of a persuasive on-going policy of abuse against MidÄContinent by the Secretary through MSHA's District Manager. Said alleged abuse, implemented by MSHA's supervisors and inspectors, seeks to subject MidÄContinent to shutdowns of its major mining units whenever possible, and whether properly or not. MidÄContinent further asserts that the order issued by MSHA was arbitrary, capricious and improper.

When MidÄContinent filed its notice of contest it further requested an expedited hearing.

The motion for an expedited hearing was granted and a two day hearing, commencing October 12, 1988, was held in Glenwood Springs, Colorado.

At the hearing both parties presented evidence concerning Order No. 3077666. The evidentiary record has been closed on that phase of the case (Tr. 442Ä443). At the hearing MidÄContinent, over the Secretary's objection, also presented evidence in support of its view that the Secretary abused her statutory discretion in enforcing the Act at MidÄContinent's mine.

At the close of MidÄContinent's evidence the Secretary orally moved the judge to dismiss all issues involving the alleged abuse of discretion by the Secretary.

The issue of an alleged abuse of discretion was initially raised in this expedited hearing. Accordingly, after the entry of an order on the issue of jurisdiction the judge indicated he would grant the Secretary time to consider whether she would stand on her motion to dismiss or seek an evidentiary hearing to present her evidence on that issue (Tr. 444).

On October 17, 1988 the judge sua sponte directed the parties to file briefs addressing the issue of whether the Commission has jurisdiction to consider an alleged abuse of discretion. Such briefs were filed.

## Issue

The issue presented here is whether the Commission has jurisdiction to review the alleged abuse of discretion by the Secretary in enforcing the Mine Safety Act at MidÄContinent's Mine in the 12 months ending September 30, 1988.

MidÄContinent asserts the Commission not only has such jurisdiction but a corresponding duty to consider allegations of Secretarial or agency abuse. Further, MidÄContinent argues that Commission has review and oversight authority over any misfeasance, malfeasance or abuse if the Commission determines such conditions exist. Finally, it is contended that the Commission has wide jurisdictional latitude and authority to fashion "other appropriate relief" for such conditions.

## Discussion

It is a fundamental principle that, as an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. See e.g., *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961); *Lehigh & New England R.R. v. ICC*, 540 F.2d 71, 78 (3rd Cir.1976); *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 674 (D.C.Cir.1973). The Commission is an independent adjudicative agency created by section 113 of the Mine Act, 30 U.S.C. 823, to provide trial-type proceedings and administrative appellate review in cases arising under the Act. Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides: e.g., section 105(d), 30 U.S.C. 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. 821, provides for complaints for compensation. Specific provisions, such as these, delineate the scope of the Commission's jurisdiction.

In view of the arguments advanced by MidÄContinent it is necessary to consider the statutory provisions in detail together with the legislative history of the Act.

Section 105(d) of the Act, 30 U.S.C. 823(d)(1) provides as follows:

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(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedures prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104. [Emphasis added by Mid-Continent].

The portions of section 105(d) emphasized by Mid-Continent in no way enlarge the Commission's jurisdiction. The hearing the Commission must afford relates to the specific matters set forth in section 105(d) and elsewhere in the Act. As stated, the Commission shall issue an order as to the citations, orders or proposed penalties. It may also direct "other appropriate relief" but this relief involves such specific citations, orders or proposed penalties. It is a fundamental rule of statutory construction that adjudication of an issue must start with the plain language of the statute. *Rubin v. United States*, 449 U.S. 424, 430 (1981); *International Union, UMWA v. Federal Mine Safety and Health Review Commission*, 840, F.2d 77, 81 (D.C.Cir.1988). I believe the statute is clear.

Mid-Continent urges the Commission to interpret its authority under section 105(d) as broadly as it has interpreted section 105(c)(2). In support of such a broad view Mid-Continent cites *Northern Coal Co.*, 4 FMSHRC 126, 142; *Glen Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463, 3464 (1980) and *NLRB v. Rutter-Rex Mfg., Co.*, 396 U.S. 258, 263 (1969). In addition,

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MidContinent claims the legislative history removes any doubts on these points:

It is the Committee's intention that the Secretary propose and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

S.Rep. No. 95-181, above, 37, reprinted in Leg.Hist. 625. [Emphasis added by MidContinent]

MidContinent's arguments are misdirected. Section 105(d) sets forth some but not all of the situations where the Commission has jurisdiction. The expression "other appropriate relief" in Section 105(c) deals with the fashioning of remedies. It does not follow that the authority to fashion such remedies can also be used to encompass MidContinent's allegations.

The cases cited by MidContinent are not inopposite these views.

In urging a broad construction of the statutory expression of "other appropriate relief" MidContinent also relies on Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (10th Cir.1983); Youghiogeny & Ohio Coal Co., 7 FMSHRC 200, 203 (1985) as well as Kaiser Coal Corporation 9 FMSHRC 1165 (1988).

I agree the Commission may grant declaratory relief in appropriate circumstances. However, such appropriate relief must necessarily relate to the contested order or citation. But MidContinent cannot fuse the contest of an order with its claims of agency abuse. It is clear that declaratory relief cannot be a vehicle to enlarge jurisdiction. Colorado Westmoreland, 10 FMSHRC 1236 (1988).

Section 113(d)(1) of the Act, 30 U.S.C. 823(d)(1) provides as follows:

(d)(1) An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the

chief administrative law judge of the Commission or by the Commission, and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this Act.

The foregoing section of the Act merely addresses the province of the Commission's administrative law judges. This section adds nothing to the Commission's jurisdiction.

Section 113(d)(2)(A)(ii) of the Act, 30 U.S.C. 823(d)(2)(A)(ii), provides as follows:

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error of procedure was committed.

The foregoing section and (A)(i) thereof mandates the standards for the Commission's review of administrative law judges decisions under the Act.

This section does not increase to Commission's jurisdiction. There are many substantial questions of law, policy or discretion involved in the various orders, citations and penalties arising under the Act. A review of the many Commission decisions discloses such issues.

Section 110(i) of the Act, 30 U.S.C. 820(i), provides as follows:

(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil

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monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

[Emphasis added by MidContinent]

MidContinent argues that this provision of the Mine Act clearly shows that one of the purposes of the Act and the Commission's oversight of MSHA is to ensure that oppressive enforcement does not place an operator at the risk of being put out of business by the instant order and MSHA's alleged abuse of discretion.

I reject MidContinent's argument. The cited portion of Section 110(i) is clearly interwoven with the assessment of civil penalties. It does not form a separate basis to confer jurisdiction.

#### Legislative History

MidContinent cites extensive portions of the legislative history of the Act and observes that the reasons for creating the Commission are contained in the legislative history. For example:

The Committee's oversight of the enforcement and administration of the mine safety laws has demonstrated that the Department of the Interior has been seriously deficient in past years in its enforcement and administrative responsibilities under these statutes. S.717 is designed and drafted to correct these deficiencies and make the enforcement of the mine safety laws more responsible to the demonstrated needs of our nation's miners and the mining industry.

[Emphasis added by MidContinent]

And, explaining the function of an independent Commission: The bill provides a right to contest orders and proposed penalties before the Commission. The Committee realizes that alternatives to the establishment of a new independent reviewing body exist. For example, under the present Coal Act, review of contested matters is an internal function of the Secretary of the Interior who has established a Board of Mine Operations Appeals to separate his prosecutorial and investigative functions from his adjudicatory functions.



The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.

The Committee believes that an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.

[Emphasis added by MidÄContinent]

S.Rep. No. 95Ä181, Committee on Human Resources on S.7187, Federal Mine Safety and Health Act of 1977, as amended, at 8Ä9, 47, 95th Cong., 1st Sess. (1977).

In reporting the conference changes to what became the 1977 Mine Act, the House characterized the functions of the Commission as follows:

The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. This separation is important in providing administrative adjudication which preserves due process and installs confidence in the program. This separation is also important because it obviates the need for denovo review of matters in the courts, which has been a source of great delay.

[Emphasis added by MidÄContinent]

123 Cong.Rec. H 11644 (daily ed. October 27, 1977)  
(Remarks of Rep. Gaydos).

MidÄContinent argues that the legislative history of the Mine Act also shows that it was a consistent intention of the Congress that the Commission be created as a check on possible abuses of enforcement discretion by the Secretary. As the Senate Committee explained its plan a full year before the Act was enacted.

#### THE MINE SAFETY AND HEALTH REVIEW COMMISSION

##### Organization of the Commission

The bill provides to an operator the right to contest any citation, order or penalty before the Commission, which is established under section 114 [sic] of the Act. The

Committee believes that an independent Commission is essential to provide impartial adjudication of these matters and protect the constitutional rights of operators. Although the Commission is patterned after the Occupational Safety and Health Review Commission, the Committee believes that the heavy caseload of that commission and the peculiar technical matters involved with mine health and safety problems warrant the establishment of an independent Commission.

[Emphasis added by Mid-Continent]

S.Rep. 94-1198, Committee on Labor and Public Welfare, Federal Mine Safety and Health Amendments Act of 1976, at 40, 94th Cong., 2nd Sess. (1976).

No doubt the Congress has oversight authority over the administration of the Act. However, a fair reading of the legislative history indicates that Congress did not consider any abuse of discretion by the Secretary in the enforcement of the Mine Act.

If it had considered that facet Congress might have vested jurisdiction with the Commission. But, as previously observed, the Commission's jurisdiction is limited.

Mid-Continent finally and simply asserts there is no other forum except the Commission. It declares the legislative history contemplates that the Commission, and of necessity its administrative law judges, have the duty to protect the constitutional rights of operators. In support of its position Mid-Continent cites the legislative history as well as *American Coal Co. v. U.S. Department of Labor*, 639 F.2d 659, 660-62 (10th Cir.1981); *Louisville & Nashville RR Co. v. Donovan*, 713 F.2d 1243, 1245-46 (6th Cir.1983) and *Bituminous Coal Operators' Ass'n v. Marshall*, 82 F.R.D. 350, 352 (D.C.1979).

The cited cases are not in opposite the views expressed in this order. In *American Coal* it was ruled the District Court lacked subject matter jurisdiction. Specifically, the Court held that an order issued by an MSHA inspector pursuant to section 103(k) was subject to review by the Commission even though the section contains no specific reference to such review. In *American Coal* the appellate Court specifically relied on that portion of the legislative history that an operator "may appeal to the Commission the issuance of a closure order. . ." 639 F.2d at 661. [A 103(k) order can often result in a mine closure].

In *Louisville and National RR*, involving black lung benefits, the appellate Court ruled the District Court lacked subject matter jurisdiction where there existed a special statutory review procedure, 713 F.2d at 1243.



the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine or surface fires, fumes, smoke and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.