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MID-CONTINENT RESOURCES V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

MID-CONTINENT RESOURCES, INC., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEST 89-3-R Order No. 3077666; 9/23/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Dutch Creek No. 1 Mine Mine ID No. 05-00301

DECISION

Appearances: Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.C., Glenwood Springs, Colorado, for Contestant;
James H. Barkley, Esq., Margaret A. Miller, Esq. Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

This contest proceeding is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"). Contestant, Mid-Continent Resources, Inc., (Mid-Continent) has challenged an order issued under Section 104(d) of the Act.

Issues

The broad issues presented here involve allegations of "MSHA enforcement abuse". Specifically, the issue is whether the Commission has jurisdiction to consider such allegations. Further, did Mid-Continent violate the escapeway regulation, 30 C.F.R. 75.1704, and was the 104(d)(2) order appropriate under the circumstances here.

Procedural History

1. Mid-Continent contested Order No. 3077666 which alleges a violation of 30 C.F.R. 75.1704.

2. In addition to its contest Mid-Continent further alleged that the order is part of a persuasive ongoing policy of abuse against Mid-Continent by the Secretary through MSHA's District Manager. Said alleged abuse, implemented by MSHA's supervisors and inspectors, seeks to subject Mid-Continent to shutdowns of its major mining units whenever possible, and whether properly or improperly. Mid-Continent further asserts that the order issued herein by MSHA was arbitrary.

3. When Mid-Continent filed its notice of contest it further requested an expedited hearing.

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

5. At the hearing both parties presented evidence concerning the contested order. The evidentiary record was closed on that phase of the case (Tr. 442-443). At the hearing Mid-Continent, 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 Mid-Continent's mine.

6. At the close of Mid-Continent's evidence the Secretary orally moved the judge to dismiss all issues involving MSHA enforcement abuse.

The issues involving abuse were initially raised in the 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).

7. 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 the allegations of MSHA enforcement abuse. Such briefs were filed.

8. On December 22, 1988, the judge issued an order dismissing Mid-Continent's broad allegation of "MSHA enforcement abuse," 10 FMSHRC 1798. The parties were further directed to file their briefs as to the merits of the contested order.

9. On January 17, 1989, during the course of other hearings involving the same parties and counsel, Mid-Continent orally moved and was granted permission to file a motion to reconsider dismissal of the "MSHA enforcement abuse" issues. (Request made in Docket Nos. WEST 88-230 and 88-231).

10. On January 25, 1989, Mid-Continent filed its post-trial brief addressing the merits of Order No. 3077666. The Secretary did not file any post-trial briefs addressing the merits of the order.

11. On February 15, 1989, the judge extended Mid-Continent's time to file its motion to reconsider to February 17, 1989, not including mailing time.

12. On February 21, 1989, Mid-Continent filed its motion to reconsider the order of dismissal previously entered on December 22, 1988.

The Secretary did not file in opposition to Mid-Continent's motion to reconsider but relied on the judge's order of December 22, 1988. (Letter, December 27, 1989).

Mid-Continent's position

Mid-Continent's position, as stated in its motion to reconsider, is that MSHA's policy directed at Mid-Continent results in 104(d)(2) closure orders for conditions which by Commission precedent justify no more than 104(a) citations. These closure orders are coupled with an enforcement intensity which is per se pervasive. It is claimed that MSHA's actions adversely affect the ability of Mid-Continent to produce coal and to continue in business. The excessive use of orders and abuse of enforcement authority constitutes harassment. The closure orders and harassment have in turn cost Mid-Continent millions of dollars in lost production which may be the death knell of the company.(FOOTNOTE 1)

The company seeks to show that it is within the Commission's power to hear and consider evidence that MSHA is harassing it with its excessive enforcement activities. That MSHA is, in effect, upgrading all citations all for the improper purpose of attempting to substantially hinder the production of coal, keep the mine closed and/or drive Mid-Continent out of business. Mid-Continent argues the judge is empowered to consider such evidence in proving the invalidity of the order herein which the operator has timely contested.

It is argued that at least some of the citations and orders MSHA issued are the fruit of improper enforcement, therefore Mid-Continent should be entitled to an order declaring such actions unlawful and enjoining MSHA from doing it further in the future. Or, stated another way, the judge is not being asked to enjoin MSHA from inspecting or citing violations as its statutory duty. Rather, the judge is being asked to issue a declaratory judgment that the contested order in this docket is invalid because it was not issued because of a violation of

the regulations but because of a pervasive intent to punish/close Mid-Continent that is unlawful. Mid-Continent further asks the judge to order MSHA to cease and desist from issuing improper citations and orders and abusing its statutory authority under the 1977 Mine Act.

Mid-Continent further submits the evidence of abuse will establish that the contested order would not have been issued but for this abusive enforcement policy.

The operator also contends that MSHA's improper enforcement policy stands in direct contradiction to the Congressionally established policy enunciated in sections 2 and 110(i) of the 1977 Mine Act, 30 U.S.C. 801 and 820(i). Therefore, Mid-Continent submits that its evidence of abuse is reviewable under section 113(d)(2)(A)(ii) of the 1977 Mine Act, 30 U.S.C. 823(d)(2)(A)(ii), as a matter concerning "[a] substantial question of law, policy and discretion . . . " and it is relevant in order to fully determine the validity of the contested order pursuant to section 105(d), 30 U.S.C. 815(d). If the enforcement is abusive and improper, then this poisoning taints its corollary inspection activities.

Mid-Continent argues that consideration by the Commission of the issue of abuse is consistent and mandated under the purposes charged by Congress in creating the Commission. The company further submits that should such abuse be established, then the Commission has the power and corollary duty to declare such abuse unlawful under the 1977 Mine Act and issue declaratory and remedial orders under its authority to grant "other appropriate relief."

In support of its views Mid-Continent cites various portions of the Mine Act. These parts will be considered infra in the same sequence as presented in Mid-Continent's motion to reconsider.

Evidence Concerning MSHA Enforcement Abuse

For the reasons hereafter stated the presiding judge has concluded that the Commission lacks jurisdiction to consider Mid-Continent's allegations of MSHA enforcement abuse. However, the judge considers it appropriate to set forth the relevant evidence for any reviewing authority.

John A. Reeves, Diane Delaney, Mark E. Skiles, Jimmie E. Kiser and David A. Powell testified for Mid-Continent.

JOHN A. REEVES, a mining engineer and a person experienced in mining, has served as President of Mid-Continent for the last 28 years. He was originally hired as a manager in 1957 (Tr. 129-132).

Mid-Continent's Dutch Creek Mines were developed from the outcrop of the coal seams with portals at an elevation of 10,000 feet. The mines contain the only medium volatile coking seam in the western United States. The seams themselves are pitched at approximately 13 degrees and they are interlaced with volcanic intrusions and geographic faults. The overburden ranges between 2500 and 3000 feet. Because of the depth of the mines they are extremely gassy. These conditions present a very difficult mining environment and probably one of the most difficult in the United States. On numerous occasions the witness has visited mines in other countries. For example, he has visited Poland, England, Germany, Belgium, France, Hungary, Mexico and Japan, to study peat mining technology and techniques in order to develop suitable techniques and technologies (Tr. 132-135).

As President of Mid-Continent and throughout his mining career the witness has maintained a close relationship with MSHA, MESA and the Bureau of Mines.

However, after the Wilberg Mine fire disaster(FOOTNOTE 2) the MSHA District was severely and unfairly criticized at the Senate oversight hearings. The Senate Investigating Committee blamed MSHA's District 9 for the fire (Tr. 147). After the hearings a marked change occurred in MSHA's attitude (Tr. 145-158). This change was exemplified in an overly stringent enforcement policy which was biased and in many situations unprofessional (Tr. 148). This change in attitude and policy was felt at Mid-Continent in the form of saturation inspections with as many as 17 inspectors per day specifically directed to issue citations and orders (Tr. 148). MSHA's stringent enforcement policy has had a drastic effect upon the operations at Mid-Continent. The saturation inspections basically took over management of Mid-Continent's mines.

Instead of being able to run the coal mining operations in an organized manner and according to planned policies, supervisory personnel at Mid-Continent are, as a result of inspections relegated to the role of "re-active management" (Tr. 149-150). In this situation the foremen are frustrated and due to threats of criminal liability they are hesitant in the performance of their duties (Tr. 150). As might be expected, morale has reached an all-time low with many good qualified miners becoming exasperated and quitting (Tr. 149-150).

During this saturation enforcement, entire mining units were unnecessarily shut down over minor infractions and incorrect interpretations of the law. These, in turn, cost Mid-Continent thousands of tons of production and made the drafting of accurate business plans impossible. Finally, this stringent enforcement policy exercised by MSHA in the Dutch Creek Mine has not resulted in any increased safety in the workplace.

With its management reacting to MSHA's demands, the company has neither the resources nor the time to continue its excellent prevention program. Despite the inspection saturation, the accident rate in the Dutch Creek Mines in this time period increased (Tr. 149-170). MSHA's new increased enforcement or as described by the witness, "abusive enforcement policy" has been conducted at a time when dramatic safety improvements have been achieved. During the last 12 months Mid-Continent made a quantum leap towards a safer operation (Tr. 151).

Mid-Continent has just completed a $40,000,000 modernization of mining operations in the coal basin. This modernization involves two 15,000 foot rock tunnels (called the Rock Tunnel Project) which intersect the coal seams. These tunnels greatly improve mine ventilation, water drainage and operations. They give the workers a level fireproof corridor for escape in the event of a mine emergency. Previously, the only escape had been up 7,000 feet of the 13 degree steep slope entries of the coal seam (Tr. 151). In addition to these improvements, Mid-Continent also implemented major organizational change designed toward improved safety. After recommendations by Herchel Potter, formerly MSHA's Chief of Safety, the company hired Jimmie Kiser to direct and implement an expanded and high-profile safety department (Tr. 152-153).

The new safety department was emphasized by the establishment of a mine rescue team of competitive quality and use, consisting of professional mine instructors from Colorado Mountain College to insure more comprehensive training of Mid-Continent's work force. Finally, the operational manager

was replaced. Mark E. Skiles was hired as the mine manager with the commitment that Mid-Continent should be totally committed to safety (Tr. 155).

Despite these measures MSHA has refused to "turn down the heat" or curb its abusive enforcement policy. Despite meetings with MSHA at the District and Arlington levels, MSHA has refused to delineate a course of action which the company must follow to alleviate or address what MSHA considers to be a problem (Tr. 155).

Reeves considers the current situation to be ironic. Coal operators are told they must invest in capital expenditures in order to meet foreign competition. Mid-Continent has invested over $40,000,000 in modernizing the mine to become competitive and it has obtained contracts with the Republic of Korea and with U.S. Steel. However, because of the overreaching enforcement by MSHA, Mid-Continent was required to invoke the force majure with the Korea/Pohang Iron and Steel Company "POSCO" (Tr. 157). It appears that Mid-Continent may have to walk away from its Korean contract (Tr. 156-157). If MSHA's overreaching enforcement continues, MSHA will have achieved an end result of putting a legitimate coal operator out of business (Tr. 156-158).

DIANE DELANEY is the Manager of Government Affairs at Mid-Continent. Her duties include lobbying at the Colorado legislature and communicating with government entities. She has been so employed for the last 10 years (Tr. 291-292).

The witness was present at a meeting in Arlington, Virginia on July 22, 1987, between MSHA Administrator Jerry L. Spicer and representatives of Mid-Continent. During the discussions Mr. Spicer stated that the increased enforcement level taking place at the Dutch Creek Mine was MSHA's response to rumors that Mid-Continent was mining in methane gas (Tr. 298-299).

Discussions disclosed that these rumors were in reality deductions derived from inspector reports the day the inspectors had difficulty attempting to observe Mid-Continent mine coal. Specifically, the company had shut down producing sections while inspectors were in the mine (Tr. 299).

The witness was present at the meeting with MSHA officials in Denver, Colorado attended by Mr. Spicer and the current MSHA District Manager for MSHA District 9, John M. DeMichiei. This meeting concerned the fact that Mr. Spicer had determined to put to rest the issue of whether or not Mid-Continent was mining in methane. In order to accomplish this objective Mr. Spicer stated

he would direct a task force of unbiased MSHA inspectors accustomed to gas and gassy mining conditions in an intensive inspection/enforcement effort at Mid-Continent's Dutch Creek Mines (Tr. 299-300).

During this meeting Ms. Delaney communicated to Mr. Spicer and Mr. DeMichiei that MSHA had lost sight of its primary objective. Much of what was occurring in the Dutch Creek Mines through the inspections seemed to be lacking in common sense and was counter-productive. Mr. Spicer and Mr. DeMichiei stated that MSHA would be willing to look into the specific instances of situations where the company felt the inspectors were not using good judgment. In fact, a meeting to explore these issues took place in Glenwood Springs, Colorado, on August 19, 1988 (Tr. 300, 301). During the meeting Ms. Delaney presented Mr. DeMichiei with a list of examples questioning inspector conduct (Tr. 301-302, Ex. C-11). While this list was far from all-inclusive it included some of the concerns Mid-Continent previously communicated to MSHA (Tr. 301-303). Although Mr. DeMichiei reviewed the list and listened to comments, he did not, as of the date of the hearing on October 12, 1988, respond to them (Tr. 305).

MARK E. SKILES is the General Manager of the Dutch Creek Mine. He has been in the coal mining industry since 1970 and he has a degree in mining engineering from Penn State. He served for two years as a MESA inspector (Tr. 311-319).

When serving as an inspector he went to work for U.S. Steel as a section foreman and was eventually promoted, in varying stages, to the position of general mine foreman in charge of the entire mine (Tr. 312). He has also served as special trouble-shooter for U.S. Steel inspecting all of their coal mines for production and safety matters. He has served as superintendent of the entire Cumberland District (Tr. 312, 314).

When he served as a MESA inspector, Skiles worked out of a MESA District 3 field office in Morgantown, West Virginia; he had frequent interaction with MSHA District 2 field office in Williamsburg, Pennsylvania and with the MSHA District office in Pittsburgh, Pennsylvania (Tr. 314, 315). Skiles is also well acquainted with most of the MSHA District 2 employees, particularly while serving as mine rescue trainer and team captain (Tr. 314, 315).

Before joining Mid-Continent, Skiles mined with gassy coal seams. While he was an inspector he frequently inspected mines in northern West Virginia, particularly the Pittsburgh-seam which liberates approximately 5 to 11 million cubic feet of methane per day (Tr. 313, 314).

Despite his familiarity with conditions similar to the Dutch Creek Mines, Mr. Skiles has difficulty making sense out of the situation at Mid-Continent. When he began with the company, it appeared to him no one was actually running the mining operation. Management was preoccupied with reacting to MSHA inspectors who were regularly shutting down the mining operations for what he considered to be doubtful or minor infractions of the law (Tr. 316, 317). In order to alleviate the problems, Skiles instituted both operational and organizational changes. He caused extensive work to be done on the ventilation system. This resulted in approximately doubling the quantity of air being brought to the working faces. Nine sub-level managers were brought into the organization and strategically located to effectively address the operator's management problem (Tr. 317, 318).

In addition to the organizational changes, Skiles took steps to open up and improve communication between MSHA and Mid-Continent. Skiles and other Mid-Continent representatives have met with MSHA officials a number of times at the field office as well as the District office and on the Washington, D.C. level (Tr. 318, 319).

In attempts to understand the situation and the evident conflict, the witness has met on numerous occasions with MSHA District 9 Manager John DeMichiei. Finally adopting the practice he used successfully at U.S. Steel, the witness instituted an open disclosure policy. In this policy management, after identifying operational problems, would disclose those problems to MSHA and further disclose what action management felt should be taken to address them (Tr. 318-319). Despite these measures MSHA has continued to saturate the Dutch Creek Mine with inspectors. In September and October 1988 there have been approximately 12 to 15 inspectors on the property daily. These inspections disrupt operations and place management in a reactive posture where a large percentage of the company's work force and resources are directed towards orders and citations and away from normal operations (Tr. 323-324).

In his communications with Mr. Skiles, MSHA District 9 Manager John DeMichiei justified his saturation inspections on his perception that they are necessary in order to keep the company from mining in methane gas. It was Mr. DeMichiei's expressed opinion that normal inspection schedules are not adequate because the company was shutting down actual mining operations during these infrequent inspections (Tr. 323). Through his experience with the MSHA District 9 hierarchies, Mr. Skiles has concluded that Mr. DeMichiei does not possess a good understanding of mining operations (Tr. 323). Furthermore, it is Mr. Skiles' view that Mr. DeMichiei places entirely too much relevance on speculation and innuendo rather than on actual facts. Addressing the accusation that Mid-Continent mines had methane gas, Mr. Skiles has found this perception on the part of Mr. DeMichiei to be both insulting and unreasonable. There is nothing in Mr. Skiles' background to suggest that he has allowed such practices in the past or that he would allow such practices now. Skiles has always maintained a policy that would result in the immediate discharge of any section or mine foreman that would permit mining operations in methane gas. In the months of April and May, 1988, during the saturation inspections, Mid-Continent produced 100,000 and 123,000 tons of coal respectively for each month (Tr. 329-330, 336).

Under his current program MSHA has reacted in a hostile and uncooperative manner toward all management attempts to correct problems at the Dutch Creek Mine. Mr. Skiles finds the current attitude and policy evidenced in MSHA District 9 to be in sharp contrast with his previous experience. In his previous work experience MSHA had been willing to work with management to solve problems, as well as to aid and assist management in the practical operation of the mine (Tr. 321-322).

Mr. Skiles feels the gains his management team has made at Mid-Continent have been made in spite of MSHA (Tr. 322). It is the witness' opinion that the MSHA current enforcement program has nothing to do with the establishment of a safe work environment in the mines. It is making a "mockery" of safety (Tr. 324). In Mr. Skiles' opinion MSHA activities at the mine have very little to do with mine safety and health. He does not know the reason but what is going on at the mine is making a mockery out of safety and that makes him "sick" (Tr. 324).

JIMMY E. KISER has been the Safety Director at Mid-Continent since January 15, 1988. He is experienced in underground coal mining and for the last 15 years has been exclusively involved in safety matters (Tr. 35-37). The witness has held safety

positions with Island Creek Coal Company (Virginia Pocahontas Division), Jewell Smokeless Coal Corporation, Leckie Smokeless Coal Corporation, Westmoreland Coal Company, Kaiser Coal Company. His field of expertise has been dealing in safety problems and he has a degree in mining engineering (Tr. 35-37).

During his career the witness has become well versed in establishing comprehensive safety programs in underground coal mines. He was hired by three companies expressly to establish safety programs. Mid-Continent hired him for that purpose. In each of the companies where Kiser was hired he was dealing with, prior to his arrival, above average injury rates and above average MSHA violation rates (Tr. 339).

In Kiser's view, in order to implement a comprehensive safety program, one must deal with human nature. A program to be successful must on a workforce wide basis and change communicative techniques, habits, attitudes and beliefs (Tr. 343). Accordingly, the process of establishing good work habits and a safe environment is a long one. At Westmoreland Coal Company it took approximately six to seven years to put together the programs that resulted in an improved safety performance (Tr. 342).

Kiser was recruited by Mr. Reeves in order to establish a new comprehensive and higher profile safety program at Mid-Continent (Tr. 153). When he began at Mid-Continent, Kiser immediately expanded both the manpower and resources allocated to the safety department. Safety inspectors were trained to provide in-house safety inspections. Further, they were to serve as liaison to facilitate an understanding of communication between Mid-Continent and MSHA by traveling with MSHA personnel on inspections. In this expansion, resources were put in place to attempt a more thorough and comprehensive training for Mid-Continent workers, supervisors, and mine rescue personnel (Tr. 344). Unfortunately, the inspection saturation was an interference which precluded Kiser and members of the safety department from implementing the new safety program. Current MSHA policy appears to Kiser to be a decision by MSHA to handle Mid-Continent safety concerns without allowing cooperation or feedback from the company. Mid-Continent's new safety program has not been effective because of MSHA (Tr. 345).

Kiser has found MSHA's adversarial stance to be "totally different" from his previous experiences in other areas. Kiser believes Mr. DeMichiei and his inspectors do not understand Mid-Continent's safety concerns (Tr. 346, 347).

DAVID A. POWELL has been continually employed by Mid-Continent since May of 1983. He has held the position of assistant superintendent at Dutch Creek Mine No. 1 and he is currently the Manager of Budget and Planning (Tr. 164-165). He is a graduate from the Colorado School of Mines in mining engineering and has successfully completed the professional engineering examination. Also he is a registered professional engineer in the State of Colorado (Tr. 164-168).

During Mr. Powell's tenure as Safety Director and continuing into his present duties he has, with counsel's help, kept records of the ongoing computerized data files concerning mine act violations issued at Dutch Creek mines and its supporting facilities (Tr. 169).

These records were kept in order to insure timely abatements and as a method of evaluating Mid-Continent's compliance with the law (Tr. 169).

Beginning in September 1987, Mid-Continent experienced a significant increase in the number of citations and orders issued by MSHA. Tabular summaries of MSHA citations and orders by month, by quarter and all units of Mid-Continent for the years 1983, 1984, 1985, 1986, 1987 and 1988 were received in evidence (Contestant's Exh. C-6 consisting of 6 pages; Tr. 171-175).

The inspection increase is readily illustrated by comparison of the graphic depictions of MSHA citations and orders, the vertical bar charts for the years 1983-1988. (Tr. 173-175, (Contestant's Exhibit C-7A, C-7B, C-7C).

The exhibits establish a measured increase in inspection activity clearly from September 1987 onward, a consequence of which can only be the result of a major change of enforcement policy by MSHA in the coal basin. The enforcement activities are disproportionate to the levels of production at Mid-Continent as the graphs for production indicate (Tr. 176-177).

MSHA's enforcement policy change was verbally confirmed to the witness on two separate occasions by MSHA officials (Tr. 171). The first occasion was during a November 1987 meeting at Mid-Continent's office in Carbondale, Colorado between company officials and the then interim MSHA District Manager Ron Shell. During the meeting Shell stated that the Inspector General had decided that Mid-Continent should be "singled out and cleaned up" (Tr. 224).

Further, in February 1988 in the MSHA office in Arlington, Virginia, company officials met with MSHA Administrator Jerry L. Spicer to discuss proposed ventilation regulations and increased enforcement at Mid-Continent. Spicer confirmed that he had "turned the heat on" in September 1987 when Ron Shell became interim District Manager for District 9 and that he, Spicer, could "turn the heat off" (Tr. 180).

During the numerous inspections that were the result of MSHA's change of policy, an MSHA inspector told Powell that they had been instructed to write Section 104(d)(2) orders; further, an S&S citation classification would be the least serious violation written (Tr. 228).

As a part of this increased enforcement policy, MSHA changed operational policies as well. Rather than implementing the changes in a normal businesslike manner, MSHA announced and implemented such changes in an ex post facto fashion by issuing orders and citations. Some of these policies affected long-standing practices such as the outby inspections of permanent seals which had been an accepted policy in Dutch Creek mines for decades (Tr. 228-231).

Since 1985 Mr. Powell, in his capacity as Safety Director and as Manager of Budget and Planning, formulated and submitted to MSHA any required plans. In order to perform this function Powell is required to deal personally with the MSHA District 9 Manager, now John DiMichiei (Tr. 276). Through these dealings and through other information Powell has come to the conclusion that Mr. DiMichiei possesses neither the practical experience nor the engineering expertise needed to adequately analyze the mining conditions in the coal basin with which Mid-Continent must deal. As a result the witness is unable to formulate a reasonable and correct enforcement program for the Dutch Creek mines (Tr. 276).

Because of DiMichiei's inexperience and the lack of engineering expertise, it is Powell's belief that many aspects of MSHA's current enforcement policies are unreasonable when applied to the unique mining conditions in the Dutch Creek mines. For example, the witness believes Mr. DiMichiei's actions in the area of rib control in the Dutch Creek Mine provides a good, although not exclusive, example (Tr. 276).

To illustrate: because of different coal characteristics, the process of supporting coal ribs along mine entries, a common practice in Eastern mines, is not commonly used in mines in the western United States. Despite the different geologic areas and conditions involved, Mr. DiMichiei has repeatedly told Powell that Dutch Creek mines need rib control. To satisfy DiMichiei's demands, Mid-Continent would have to institute a program in which the coal ribs would be bolted. This practice, if performed in mines with overburden characteristics as contained in the Dutch Creek mines, would create dangerous bursting conditions (Tr. 278).

Due to the magnitude of overburden resting on the coal seam, entries in the Dutch Creek Mines should be developed through the creation of "yielding-pillars". By this mining technique pillars are developed in a configuration to prevent the dangerous accumulations of pressure. When this pressure is released geologic events commonly described in the industry as "bounces" or "bursts" occur.

To avoid dangerous accumulations of pressure and the danger of bursts, a yielding pillar gives under the pressure of the overburden and crushes out slowly over a period of time. This yielding is evidenced by rib sloughage. But should a yielding pillar be bolted it would prevent or reduce rib sloughage. As a result the pillar would accumulate huge pressures and present the possibility of a violent burst (Tr. 276-279).

Mr. Powell has on numerous occasions explained the need to utilize yielding pillars in the Dutch Creek mines to Mr. DiMichiei. Despite this, Mr. DiMichiei continues to insist that Mid-Continent management somehow contain its pillars to prevent sloughing. In this context it appears to Powell that Mr. DiMichiei has insisted that Mid-Continent create a hazardous situation in place of a practice the operator has demonstrated to be effective in eliminating pillar outbursts (Tr. 279-280).

Since he assumed the duties as MSHA's District Manager, Mr. DiMichiei has demonstrated great concern about the rumors that Mid-Continent does not follow its approved ventilation plan and mined in gas (Tr. 299-327). During a meeting on July 11, 1988, at the Denver MSHA office Mr. DiMichiei outlined his program of saturation inspections to determine Mid-Continent's compliance with its ventilation plan and the ventilation regulations (Tr. 203-204). At the meeting DiMichiei threatened to revoke Mid-Continent's violation plan should Mid-Continent refuse to agree to the saturation inspections (Tr. 287).

The MSHA District 9 saturation inspections began September 22, 1988. During this saturation inspection program an inspector was stationed each day in each producing section on every shift. The inspection lasted through October 1988 and did not conclude until the end of the calendar year. The BAB saturation inspection followed on the heels of the Spicer-saturation inspection; namely, the BAA inspection.

The inspectors conducting the BAA saturation inspections were not employed in MSHA District 9 and came from outside the District. All the inspectors had experience in gassy mines. The BAA inspectors had just completed an inspection at Jim Walters' Alabama mines which, together with Mid-Continent's, are considered to be some of the gassiest mines in the nation (Tr. 204-211). During the BAB inspection a District 9 inspector was assigned to every producing section on every shift throughout the balance of the month of September 1988 (Tr. 204-211)

Powell's records showed that during the 22 days of the BAA ventilation saturation inspection, a total of 66 citations, orders and safeguards were issued (See Exh. C-10A, Appendix D). However, only 39 of these citations, orders and safeguards related to the ventilation saturation inspection itself (Contestant Exh. C-10D, Appendix D). However, no citation, order or safeguard was issued relating to mining in explosive methane mixtures.

The witness believes the inspectors are under pressure to write orders. They often say they have no choice. However, the inspectors rely on their own judgment (Tr. 235-237).

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Mid-Continent has received the following citations and orders for the months indicated:

	Citations	Orders
September 1987	111	37
October 1987	158	31
November 1987	134	15
December 1987	87	23
January 1988	135	19
February 1988	114	18
March 1988	88	41
April 1988	70	40
May 1988	50	6
June 1988	77	12
July 1988	123	100
August 1988	99	150
September 1988	135	34

(Tr. 236-238; Ex C-6)

Mid-Continent also presented extensive exhibits. The exhibits relevant to allegations of MSHA enforcement abuse are as follows:

C 6: Monthly MSHA citation and orders 1983 through 1988.

C 7(a): Graph, citations and orders 1983 and 1984.

C 7(b): Graph, citations and orders 1985 and 1986.

C 7(c): Graph, citations and orders 1987 and 1988.

C 8: 1988 MSHA inspections.

C 9: Citations, Orders and Safeguards issued in September 1988 (6 pages).

C 10: Citations, Orders and Safeguards issued September 1, 1988 through September 21, 1988.

C 10(b): Ventilation Violations September 1, 1988 through September 18, 1988.

C 10(c): Orders re Special Ventilation Inspections September 1, 1988 through September 19, 1988.

C10(d): Special Ventilation Inspection. BAA Orders/ Citations in September 1988.

C 11(a): All Citations and Orders (Noise/dust) issued September 22, 1988 through September 30, 1988 (4 pages).

C 11(b): Citations and Orders September 22, 1988 through September 30, 1989 (Noise/dust).

C 11(c): Citations and Orders September 22, 1988 through September 30, 1988 (Noise/dust).

C 11(d): Citations and Orders issued September 22, 1988 through September 1988 (Noise/dust).

C 12: Memo prepared by Diane Delaney re Mining Association Meeting on June 28, 1988 (5 pages).

C 13: 5 page exhibit entitled "MSHA Orders."

C 14: Coding for various MSHA mandatory inspections and investigations.

Discussion and Conclusions

The initial issue presented here is whether the Commission has jurisdiction to consider Mid-Continent's allegations that MSHA abused its statutory authority in enforcing the Mine Act.

In Kaiser Coal Corporation, 10 FMSHRC 1165 (1988) the Commission clearly articulated its jurisdictional authority. At 1169 the Commission stated as follows:

> We begin with the fundamental principle that, as an administrative agency created by statute, we cannot exceed the jurisdictional authority granted to us 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 order 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.

The Commission's statement of the law would appear to conclude the matter; however, it is nevertheless appropriate to consider Mid-Continent's arguments in greater detail.

Mid-Continent states that section 113, 30 U.S.C. 823(d)(1),(FOOTNOTE 3) supports its position.

The section, as indicated, addresses the province of Commission's administrative law judges. The precise issue urged here was ruled contrary to Mid-Continent's position in Kaiser Coal Corporation, supra. Specifically, the Commission ruled that section 113(d)(1) is procedural in nature. Further, the language in the Act "describes the scope of the judge's authority to hear and decide matters in those proceedings otherwise properly filed pursuant to the Act. In short, section 113(d)(1) does not constitute an independent grant of subject matter jurisdiction", 10 FMSHRC at 1169, 1170.

The Commission's pronouncement is clear and articulate. As a judge of the Commission I am bound to follow established precedent.

~1034

With an emphasis stressing and relying on section 105(d), 30 U.S.C. 815(d),(FOOTNOTE 4) Mid-Continent contends its view of subject matter jurisdiction is correct.

In particular, the operator relies on the statutory statements that "the Commission shall afford an opportunity for a hearing" 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."

The portions of the Act relied on by Mid-Continent fall within the rationale as stated in Kaiser Coal Corporation, supra. In addition, the legislative history indicates that the Congress viewed this section as procedural rather than one conferring subject matter jurisdiction. See S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 636. ("Legis. Hist.")

The reliance by Mid-Continent on section 113(d)(2)(A)(ii), 30 U.S.C. 823(d)(2)(A)(ii)(FOOTNOTE 5) is also misplaced. If followed to its logical conclusion this section would confer virtually unlimited jurisdiction on the Commission. In short, the Commission would no longer be limited to the jurisdictional authority granted it by Congress.

Section 113(d)(2)(A)(ii) merely delineates appellate procedure if the proceedings are otherwise properly filed pursuant to the Act. On this point see Legis. Hist. at 636 and 1338 (1978); See also footnote 5 in Kaiser Coal Corporation, 10 FMSHRC at 1170.

Further Arguments by Mid-Continent

Mid-Continent also states that under the statutory scheme evidence of claimed abuse falls within the jurisdiction of the Commission in two additional different respects.(FOOTNOTE 6)

First, it is urged that evidence of abuse is relevant under section 105(d) to the extent that it affects the validity of the contested order. In this docket, Mid-Continent argues the evidence of abuse is relevant to rebut MSHA's claim that the contested escapeway order was properly issued.

Evidence of abuse, according to Mid-Continent, sets the inspection and the entire inspection activity in its true context. The evidence presented would allow the Commission to make an accurate and informed decision whether the conditions cited by MSHA in this docket in fact constitute a violation of any regulation, or whether alleged circumstances are nothing more than a pretext, improperly used, in an attempt to justify the interruption of coal production.

Second, in determining the validity of a contested order under section 105(d) the Commission is authorized under section 113(d)(2)(A)(ii) to review matters involving "[a] substantial question of law, policy and discretion . . . . "

Under the facts presented in this docket, Mid-Continent asserts it has alleged the invalidity of Order No. 3077666. It has brought this contest on the basis that it was the tainted product of a policy designed to improperly issue closure orders and curtail production. The extent to which this policy contributed to the invalidity of the subject order is clearly within the jurisdictional purview of section 113(d)(2)(A)(ii).

It is argued that consideration of Mid-Continent's abuse claim is entirely consistent with the purpose for which the Commission was established. In reporting the conference changes of the 1977 Mine Act, the House, mindful of the alleged short-comings of Interior's Board of Mine Operations Appeals, characterized the functions of the new 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 de novo review of matters in the courts, which has been a source of great delay. [Emphasis supplied by Mid-Continent].

123 Cong. Rec. H 11644 (daily ed. October 27, 1977) (Remarks of Rep. Gaydos). See also, S. Rep. No. 95-181, Committee on Human Resources on S. 717, Federal Mine Safety and Health Act of 1977, as amended, at 8-9, 47, 95th Cong., 1st Sess. (1977).

According to Mid-Continent the legislative history of the 1977 Mine Act shows also that it was a consistent intention of the Congress that this new, independent Commission be created as a check on possible abuse in the enforcement of the Act by the Secretary. As the Senate Committee explained its plan a full year before the Act was enacted:

> 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 supplied.] 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).

Further Discussion

Contestant's arguments concerning "MSHA enforcement abuse" are not persuasive.

Mid-Continent has failed to distinguish between "MSHA enforcement abuse" and inspector abuse in connection with a given order or citation.

Certainly an MSHA inspector may abuse his individual discretion in issuing a given order or citation. Abuse of discretion can exist in many areas.(FOOTNOTE 7)

The operator states that the violative conditions involving the escapeway cited by Inspector McDonald constituted a pretext to justify the interruption of coal production. In support of its view Mid-Continent states that "(i)n this regard, it should be recalled from the evidence that the inspector and his supervisor set out to examine an ostensible roof support problem in the 103 longwall section (Kiser, Tr. 40, 44). When no roof problem was found (Kiser, Tr. 48, 50) the MSHA supervisor became belligerent and issued a verbal closure order "because the escapeway was blocked' (Kiser, Tr. 51). The escapeway was not blocked, and it was passable as the evidence shows (Kiser, Tr. 62-63), but the MSHA supervisor refused to permit Mid-Continent's Safety Director to demonstrate that an injured person could be littered out of the section (Kiser, Tr. 52)."(FOOTNOTE 8)

I am not persuaded by this argument. As a threshold matter, it is not reasonable to conclude that the evidence relied on establishes that Inspector McDonald intended to interrupt coal production. In addition, as will be noted infra, the order mentions "heavy roof problems" but the Secretary's evidence (which was not objected to) basically only addresses the condition of the escapeway.

Mid-Continent, citing Helen Mining Co., 1 FMSHRC 219 (1979), also asserts the Commission is the final interpreter of policy under the Act.

Contrary to the operator's view, in a recent decision, the Court of Appeals for the District of Columbia(FOOTNOTE 9) ruled that when the Secretary of Labor and the Commission disagree over the interpretation of a regulation and both views are plausible "the Secretary rather than the Commission is entitled to the deference described in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)."

In support of its position Mid-Continent also relies on the penalty criteria provisions as contained in section 110(i), 30 U.S.C. 820(i)(FOOTNOTE 10).

I completely agree the Commission is bound to consider the effect of a penalty on the operator's ability to continue in business. However, we are dealing here with subject matter jurisdiction. In addition, I fully concur with Mid-Continent's statement that "section 110(i) cannot be viewed as an independent basis upon which to justify Commission review of Agency action."(FOOTNOTE 11) Accordingly, it is not necessary to further explore Section 110(i).

In support of its position Contestant also relies on section 105(d)(2) of the Act,(FOOTNOTE 12) the legislative history, and Commission's broad scope of its authority under this section as expressed in Northern Coal Co., 4 FMSHRC 126, 142 (1982).

Mid-Continent's argument is misplaced. The statute, the legislative history and the cited case law all relate to discrimination cases which are otherwise properly before the Commission within its grant of authority. In short, and to answer the operator's position:(FOONTOTE 13) a cease-and-desist order may be appropriate in a discrimination case but a discrimination claim does not bear a remote relationship to MSHA's enforcement abuse as alleged here.

Finally, the operator states the reasoning in the judge's prior order is too narrow.(fOOTNOTE 14) In particular, the order is wrong for three reasons. First, any injury to Mid-Continent from an improperly issued order is not cured by invalidating the order in a contest proceeding. For example, the cost of the legal proceedings and lost coal production can never be recovered.

Second, the wrong inflicted by MSHA's misconduct is not remedied by empowering the injured party repeatedly to take the wrongdoer to court. It is argued that equitable injunctive remedies such as cease-and-desist orders were developed to address this very inequity.

Third, there is simply no way an operator can match the resources of the United States. Simply put, it is not possible for a small operator like Mid-Continent to litigate the 1,244 citations and 235 orders issued to it by MSHA during the calendar year 1988.(FOOTNOTE 15) The shear enormity of the numbers make individual contests an impossibility and a remedy which is no remedy at all.

I am aware of Mid-Continent's eloquent arguments. But for the reasons previously stated I do not find the requisite authority to issue a cease-and-desist order against the Secretary in her enforcement of the Act.

The fundamental cornerstone of Mid-Continent's position is that the Commission has jurisdiction to issue injunctive relief against the Secretary. The foregoing portion of this decision addresses all the issues raised by Mid-Continent. But a persuasive argument against Mid-Continent is contained in

Section 108(a), 30 U.S.C. 818, where Congress clearly indicated it means how to provide injunctive relief. But in this section such relief is only in favor of the Secretary against an operator. The section reads as follows:

Injunctions

Sec. 108(a)

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent -

(A) violates or fails or refuses to comply with any order or decision issued under this Act.

(B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education and Welfare or his authorized representative, in carrying out the provisions of this Act.

(C) refuses to admit such representatives to the coal or other mine.

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine.

(E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this Act, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education and Welfare determines necessary in carrying out the provisions of this Act.

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in a pattern of violation of the mandatory health or safety standards of this Act, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.

(b) In any action brought under subsection (a), the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2), the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this Act shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) shall continue in effect until the completion or final termination of all proceedings for review of such order under this title, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of title 5 of the United States Code, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

The legislative history concerning this section does not assist Mid-Continent's position. Legis. Hist. at 602.

In sum, Congress knows how to provide for injunctive relief. It did so in connection with the Mine Act. However, Congress did not vest subject matter jurisdiction with the Commission to address the issue of MSHA enforcement abuse.

For the foregoing reasons Mid-Continent's allegation of MSHA enforcement abuse should be dismissed.

Attorney's fees and lost coal production

At the hearing contestant sought to offer evidence of its costs incurred in attorney's fees and lost coal production (Tr. 6-14).

The judge refused to hear such evidence and required contestant to submit an offer of proof as to these matters.

The judge's order entered at the hearing is affirmed in this decision. Attorney fees and lost coal production are not recoverable in this forum. Rushton Mining Company, PENN 85-253-R (May 10, 1989) (Commission); Beaver Creek Coal Co., 10 FMSHRC 758 (1988).

Merits of Order No. 3077666

The order contested here alleges Mid-Continent violated 30 C.F.R. 75.1704.(FOOTNOTE 16) The alleged violative condition was

described in the order as follows:

> 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.

Secretary's Evidence Concerning Order No. 3077666

GRANT McDONALD, an MSHA inspector, is a person experienced in mining.

On September 23, 1988, he was directed to do some health surveys at Mid-Continent. During the inspection he traveled the length of the 103 longwall. The longwall has an intake escapeway which is also a travelway (Tr. 389-393).

Inspector McDonald's primary purpose was to check on a supposedly bad roof. As he went into the area he observed the bottom was heaved and there were some water holes containing floating material consisting of blocks and wooden wedges (Tr. 394). Along the ribs there were a lot of tin cans, boards, steel rods and different things strewn about. The witness also noted it was difficult to walk in the area because it was heaved. Heaving, he explained, was where the pressure pushed down and as a result the floor was pushed up. There was heaved bottom for approximately 800 to 900 feet. The heaved conditions made traveling difficult. The steeper slope hampers your traveling ability (Tr. 394-395).

This escapeway is pitched at an angle and you can step on particles and trip or slide. If the area is well rock-dusted you can also slide in the rock dust. In the witness' opinion a hazard existed since you couldn't exit quickly from the area (Tr. 395).

The heaving in the area makes it slicker and harder to stand. Slippery conditions make it more difficult to quickly leave the area (Tr. 396).

Except for the two water holes there was rock dust throughout the 800 foot length of the escapeway.

The water hole in the escapeway was approximately 8 inches deep where the inspector measured it (Tr. 396). There was a board floating in the water; also the board had some nails protruding from it. The water wasn't over the inspector's boots. But the objects floating on the water created a tripping hazard. Also there were lumps of coal in the water that a person could stumble on (Tr. 397).

The pieces floating on the water were 8 to 15 inches long (Tr. 398).

Towards the longwall face there were timbers, steel rods used for bolting and 5-gallon containers, as well as some rock dust paper sacks. Most of the debris was on the lower side of the ribs.

The inspector issued the order because of the accumulations of the material and the heaving. He felt it was unsafe to make a quick exit from the area in case of an emergency (Tr. 399).

The fact that the distance between the heaved floor and roof was less than five feet did not affect the inspector's decision to issue the order (Tr. 399, 400).

The entry itself was probably 16 to 18 feet wide. He issued the order because of the travel conditions and the material floating on the water, not because of the height or width of the escapeway (Tr. 400, 401).

In the inspector's opinion the supposedly bad roof in the area was adequately supported (Tr. 400, 401). The roof itself was sufficiently high to provide an escapeway.

The purpose of an escapeway is to provide a quick exit from the area or quickly remove someone that is injured. It also introduces fresh air into the mine (Tr. 401).

On two occasions Inspector McDonald had carried an injured person on a stretcher out of a mine. The footing in this instance was slippery because of coal and rock dust (Tr. 403).

The escapeway was not impassable. The angle of the floor prevented quick passage.

The inspector was not told to issue this order as an S&S violation. He determined the violation should be S&S because it was known, or should have been known, to the operator (Tr. 403, 404, 408). From the hazard he observed, the inspector concluded a miner traveling the entry could trip, fall, slip or get a puncture [wound] (Tr. 404). He considered these possibilities to be reasonably likely to occur (Tr. 404). Also a man carrying a stretcher could slip and drop it (Tr. 405). Dropping someone can aggravate a prior injury to the person being carried (Tr. 407).

On the day of the inspection Mid-Continent's safety director slipped and fell in the entry. But he was not injured (Tr. 409).

On his own judgment Inspector McDonald issued his order under 104(d)(2) as an unwarrantable failure (Tr. 409). The inspector initially noted the operator's negligence as moderate. Inspector Steve Miller later marked the negligence as high. Inspector McDonald felt the material in the escapeway had been allowed to accumulate for some time (Tr. 410-411). The numerous buckets and steel rods could not accumulate in one or two days, but it would take several days (Tr. 411).

The area was subject to a preshift examination (Tr. 412).

Inspector McDonald in his sole decision terminated the order the following day. In terminating the order he required the operator to gather up the materials and stack them; to remove the blocks and stumbling hazards. Where the floor was severely heaved he required the operator to lower it and level the walkways as nearly as possible (Tr. 413, 414).

The company leveled the floor heaves by using pick and shovels. They also hand carried the debris out of the area, removed the floating material and pumped down the water holes (Tr. 413). All of the abatement work was done for the entire distance of 800 to 900 feet (Tr. 413).

The inspector did not take any measurements of the escapeway after the order was terminated.

Mid-Continent's Evidence on the Merits

JIM KISER, Mid-Continent's safety director, accompanied the inspectors in the 103 headgate. Inspector Miller said there was a major roof control problem in the area. After looking at the roof area the group went to the tailgate. Mr. Miller became belligerent and ordered Kiser to remove everyone from the face (Tr. 39-51).

He then issued a 104(d)(2) order because the escapeway was blocked. The witness replied it was not blocked (Tr. 51).

At the face miners were drilling to prevent outbursts (Tr. 55).

Kiser took a four-foot lathe stick and traveled the area. There was no debris in the area except for about 150 feet. The witness believed the escapeway was passable beginning at the 103 longwall intake escapeway to the 103 longwall at the face. (Tr. 62).

The order did not refer to any stumbling hazards. Except for about a distance of 200 feet the height of the escapeway was seven feet (Tr. 63).

The heaving of the floor caused a domed effect. The crown was about a foot wide; at the crown it measured 4 1/2 feet to the roof (Tr. 65). The most restricted area of the escapeway was 4 1/2 feet high by 8 feet wide (Tr. 93).

Kiser offered to demonstrate to Inspector McDonald that the area could be traveled and was passable by an injured person on a stretcher. The inspector replied that the only thing to be done was to clean up the passageway (Tr. 52).

In addition, Mid-Continent's evidence established that an injured miner was successfully evacuated via the escapeway from the 103 longwall headgate on June 8, 1988. At the time walking through the area was a "chore." On the other hand, the conditions were one hundred percent better on the day the instant order was issued (Tr. 67-70).

MICHAEL W. HORST, a Mid-Continent safety inspector, travels with federal inspectors ninety percent of the time. On the date of this inspection he accompanied Inspector McDonald and Inspector John S. Miller.

Mr. Miller pointed out to the witness that the escapeway was neither six feet wide nor five feet high (Tr. 95-100). Miller, who took measurements, said the escapeway didn't meet the criteria (Tr. 101-102, 115-116).

As a result of the order the company had to expand the escapeway in a half dozen places (Tr. 116).

Bill Porter, a mine foreman, was in charge of doing the work necessary to terminate the order. Water holes were pumped and garbage was moved from the low rib to the high rib (Tr. 117-119). It took about 22 hours to abate the order (Tr. 122). The heaving in the floor was abated by the use of pick and shovel. The company was not permitted to use machines. The witness did not know who prohibited the use of machines (Tr. 127-128).

Discussion

The evidence on the merits of the order is essentially uncontroverted.

Specifically, on an uneven domed mine floor we find tin cans, boards, steel rods, 5-gallon containers, rock dust paper sacks, nails protruding from boards and wooden blocks floating in an 8-inch deep water hole. These conditions, essentially uncontroverted, constitute stumbling hazards that failed to "insure passage of miners at all times" within the mandate of 75.1704.

Mid-Continent's position focuses on the views that no violation of 75.1704 occurred; further, the escapeway was passable as described in Utah Power and Light Company, 10 FMSHRC 71 (1988). In addition, the contested order would not have been issued if the inspector had not erroneously interrupted the regulation to require "quick" passage to the surface. Finally, the circumstances here are inappropriate to support a section 104(d)(2) order.

As a threshold matter Utah Power and Light Company, supra, supports the Secretary and not Mid-Continent. The UP&L case involves three cases and separate factual scenarios. These should be reviewed: In WEST 87-210-R tripping and stumbling hazards existed. The hazards were lumps of coal together with an 8 to 10 inch offset in the escapeway bottom. In WEST 87-211-R tripping hazards consisted of loose coal and sloughage, the toe of a rib extending into the escapeway and a 6-inch waterline obstructing the escapeway.

In the above two cases the undersigned judge held that the foregoing conditions failed "to insure passage at all times of any person, including disabled persons," 10 FMSHRC at 84.

On the other hand, in WEST 87-224-R there was no evidence of any stumbling hazards. In addition, the Secretary agreed the escapeway was fully adequate. But the citation was written solely because the escapeway did not meet the 5 foot by 6 foot criteria contained in 75.1704-1.

Based on the record in WEST 87-224-R the undersigned held that MSHA could not, at least without the benefit of rule-making, substitute its own design; that is, specific linear foot requirements for the height and width of escapeways, 10 FMSHRC at 74. Accordingly, the contest in WEST 87-224-R was sustained.

To further consider Mid-Continent's argument in the instant case, it is necessary to divide the separate parts of 75.1704(FOOTNOTE 17).

Mid-Continent further contends the structure of 30 C.F.R. 75.1704 establishes the following:

> 1. The first sentence addresses what travelable passageways can be designated as escapeways, and how these escapeways are to be maintained.
>
> 2. The second sentence addresses how mine openings are to be maintained.
>
> 3. The third sentence addresses itself to slope and shaft escape facilities, their location, maintenance and testing.

Mid-Continent argues the "quick" passage is not a description or requirement contained in the pedestrian escapeway portion of the regulation. In short, to accomplish the result reached by Inspector McDonald one must construe the term "travelable passageway" as being synonymous with the third sentence term of "escape facility." It is urged that such a term is clearly inconsistent with both the common terminology used in the coal mining industry and the plain reading of the regulation.

It is further stated that in industry parlance, slopes and shafts are commonly associated with steeply pitched or vertical entries extending to the surface. And because of their grade or pitch, they are difficult if not impossible to travel by foot. In such entries, mechanical equipment such as a hoist or an elevator (an "escape facility") must be in place to facilitate a "quick" escape from the mine. See, 30 C.F.R. 75.1704-1(b).

In addition, the language of section 75.1704 recognizes the above distinction. It does not treat the terms "escape faciliity" and "travelable passageway" as being synonymous. It is argued that if there was not meant to be a real distinction there is no reason to use distinctive terms in the first-sentence vis-a-vis the third-sentence. Mid-Continent argues there is no other logical reason for the distinctive terminology. Compare, 30 C.F.R. 75.1704-1(a) and -1(b).

I concur with Mid-Continent that a fair reading on the inspector's testimony indicates he believes "quick passage" is required by the regulation. However, his views are not

binding on the Commission. Basically, the plain words of 75.1704 require that travelways be maintained to "insure" passage. "Insure," according to Webster,(FOOTNOTE 18) means "to make certain esp. by taking necessary measures and precautions." To like effect see Utah Power and Light Company, supra.

For these reasons Mid-Continent's "quick" escape arguments are rejected.

Mid-Continent also states that if the debris from expended mining materials constitutes a genuine issue then the operator should have been cited under 30 C.F.R. 75.400-2.(FOOTNOTE 19)

This argument is rejected. It is well established that an operator cannot shield itself from liability for the violation of a mandatory standard simply because the operator violated a different but related standard, El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981).

The Secretary alleges the violation herein was "significant and substantial." Such a violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission further explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In the case at bar the Secretary has failed to establish evidence to support a finding required in the third and fourth paragraphs as contained in Mathies Coal.

For the foregoing reasons the designation of S&S should be stricken.

Finally, Mid-Continent states that the order was improvidently designated as an "unwarrantable failure" under Section 104(d).

I agree. The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987), The Helen Mining Company, 10 FMSHRC 1672 (1988). In the case at bar I find no aggravated conduct by the operator and the unwarrantable failure designation for Order No. 3077666 should be stricken.

For the following reasons I enter the following:

~1054

ORDER

1. Contestant's motion to reconsider the judge's ruling of December 22, 1988, is denied and Contestant's allegations of "MSHA enforcement abuse" are dismissed for lack of subject matter jurisdiction.

2. Order number 3077666 is affirmed as a violation under Section 104(a) of the Act.

3. The allegations that the violation was significant and substantial are stricken.

4. The allegations that the contestant unwarrantably failed to comply with the regulation are stricken.

John J. Morris
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Mid-Continent's motion to reconsider at 2.

~FOOTNOTE_TWO

2. This coal mine disaster occurred on December 19, 1984.

~FOOTNOTE_THREE

3. The cited portion reads 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.

~FOOTNOTE_FOUR

4. The cited portion of the Act provides as follows:

(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.]

FOOTNOTE-FIVE

5. The cited portion reads 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. [Emphasis added by Mid-Continent).

~FOOTNOTE_SIX

6. Mid-Continent motion to consider at 5.

~FOOTNOTE_SEVEN

7. For example, under Commission Rule 51, 29 C.F.R. 2700.51, a Commission judge may select a hearing site. In Lincoln Sand and Gravel Company it was held the judge did not abuse his discretion in setting a hearing at a location 150 miles from the mine. On the other hand, in Cut Slate, 1 FMSHRC 796 (1979), a judge abused his discretion by requiring a small quarry operator to attend a prehearing conference about 450 miles from the operator's mine.

~FOOTNOTE_EIGHT

8. Footnote 2, page 6, Mid-Continent motion to reconsider.

~FOOTNOTE_NINE

9. Secretary of Labor, et al, on behalf of John W. Bushnell v. Connelton Industries, Inc., 867 F.2d 1432 (1989).

~FOOTNOTE_TEN
10. The cited portion reads as follows:

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

~FOOTNOTE_ELEVEN
11. Motion at 8.

~FOOTNOTE_TWELVE
12. (2) Any miner . . . who believes that he has been . . . discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary . . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . . The Commission shall afford an opportunity for hearing . . . and thereafter shall issue an order, based upon findings of facts, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief . . . . (Emphasis added by Mid-Continent).

~FOOTNOTE_THIRTEEN
13. Motion at 11.

~FOOTNOTE_FOURTEEN
14. Motion at 10-12.

~FOOTNOTE_FIFTEEN
15. Mid-Continent motion at 12 asserts total numbers are not available for October, November and December, 1988, at the evidentiary hearing held October 12 and 13, 1988.

~FOOTNOTE_SIXTEEN
16. The cited regulation provides as follows:

75.1704 Escapeways - [Statutory Provisions]

Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape opening, or continuous to the escape shaft or slope facilities to 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 of 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.

~FOOTNOTE_SEVENTEEN
17. Mid-Continent divides the regulation into three sentence; As divided it reads:

[1] Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall provide from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. [2] Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. [3] 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. [Bracketed sentence numbers supplied.]

~FOOTNOTE_EIGTHTEEN
18. Webster's New Collegiate Dictionary, at 595.

~FOOTNOTE_NINETEEN
19. The regulation relied on reads as follows:

75.400-2 Cleanup program

A program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained. Such program shall be available to the Secretary or authorized representative.