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

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-227
A.C. No. 36-06475-03501 YIV

v.

Iselin Preparation Plant

PENNSYLVANIA ELECTRIC COMPANY,
RESPONDENT

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
John P. Proctor, Esq., Bishop, Cook, Purcell, &
Reynolds, Washington, DC, and Timothy N. Atherton, Esq.,
Pennsylvania Electric Company, Johnstown,
Pennsylvania for Respondent.

Before: Judge Melick

In these civil penalty proceedings under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," the Secretary of Labor has alleged two violations in Citations No. 2884282 and 2884283 of the mandatory standard at 30 C.F.R. 77.400(c). In particular she has charged that employees of the Pennsylvania Electric Company (Penelec) removed protective guards at the No. 5A and No. 5B head drives for the belt conveyor at the top of Bin 2 at the 001 Preparation Plant. In its Answer and at initial hearings below Penelec asserted that the Secretary of Labor through her Mine Safety and Health Administration (MSHA) did not have jurisdiction under the Act, to conduct inspections at the cited 5A and 5B head drives. Assuming jurisdiction did exist Penelec did not dispute the existence of the cited violations or that there was a reasonable likelihood that the hazard contributed to by the violations would result in an injury of a reasonably serious nature.

On review a majority of the Commission held that jurisdiction over the cited 5A and 5B head drives existed under the Act but remanded the case for further proceedings on the question of "whether the Secretary of Labor, through the Mine Safety and Health Administration (MSHA) has properly

exercised her authority to regulate the cited working condition at Penelec's generating station."

On remand the Secretary objects to the scope of the remand order and maintains that Commission review of her internal decision-making processes and intrusion by the Commission into her reasons and motives for such decisions is impermissible and privileged. She argues that the Commission is without jurisdiction to make such inquiry in these civil penalty proceedings and notes that the Federal District Courts have been granted exclusive jurisdiction under the Administrative Procedure Act, (5 U.S.C. 702 and 704) to review the Secretary's actions when properly challenged. The Secretary maintains that she has been given sole discretion under Section 3(h)(1) of the Act to decide whether OSHA or MSHA should inspect the subject area of the mine based on administrative convenience. She further argues that the Commission has no lawful authority in any event to order sanctions against her even should she be found to have acted "improperly".

These important arguments should, of course, have been presented by the Secretary when this case was on review before the full Commission so that the matter could have been fully briefed, argued and considered by that body. In any event, in light of my findings herein, there is no need to reach these issues.

Following additional hearings on remand I find that although the Secretary never clearly established, prior to the issuance of the citations at bar, that MSHA would assert exclusive inspection authority over the subject 5A and 5B head drives, I do not find in these civil penalty proceedings any legally cognizable Secretarial impropriety in exercising her authority to regulate the area of the cited 5A and 5B head drives identified or sanctioned within the framework of the Act.¹ This does not mean that the Secretary's practices disclosed at hearings should be condoned or be found to be acceptable. Indeed the Secretary's past practice of determining MSHA inspection authority over the subject area based upon whether the workers present at that time were members of the United Mine Workers of America (in which case MSHA inspected the area) or members of the International Brotherhood of Electrical Workers (in which case MSHA did not inspect the area) is quite bizarre and clearly unacceptable.

