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April 21, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	
	:	Docket No. PENN 2004-158
v.	:	A.C. No. 36-08746-26477 LVY
	:	
PBS COALS, INC.,	:	Quecreek No. 1 Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	
	:	Docket No. PENN 2004-152
v.	:	A. C. No. 36-08746-26478 KQN
	:	
MUSSER ENGINEERING, INC.,	:	Quecreek No. 1 Mine
Respondent	:	

DECISION ON REMAND

Before: Judge Lesnick

These consolidated civil penalty proceedings brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (2000) (hereinafter the "Mine Act" or "the Act"), have been remanded by the Commission for reassessment of the civil penalty assessed against PBS Coals, Inc. ("PBS") for a violation arising from the July 24, 2002 nonfatal entrapment of nine miners for three days at the Quecreek No. 1 Mine, located in Somerset, Pennsylvania. *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010). The miners broke through from the Quecreek mine to the abandoned workings of an adjacent mine that was full of water. They did so in reliance upon an inaccurate mine map prepared by PBS, which was in turn based on a map prepared by Musser Engineering, Inc. ("Musser"). Water from the abandoned mine flowed forcefully into the Quecreek mine and entrapped the miners. The Secretary of Labor's Mine Safety and Health Administration ("MSHA") cited PBS and Musser for violating 30 C.F.R. § 75.1200, which requires coal mine operators to keep on the mine site "an accurate and up-to-date map of such mine drawn on

scale."

On cross motions for summary decision, I concluded that PBS and Musser violated section 75.1200 as alleged by the Secretary. *Black Wolf Coal Co.*, 28 FMSHRC 699, 709, 716 (July 2006) (ALJ). As to the civil penalties proposed by the Secretary, there remained outstanding questions of material fact that precluded summary decision. *Id.* at 711, 717. After the matter went to hearing, I concluded that PBS and Musser acted in a grossly negligent manner, that the violations they committed were of the highest gravity, and that imposition of the maximum penalties provided for in the Mine Act was appropriate. *PBS Coals, Inc.*, 30 FMSHRC 1087, 1095-96 (Nov. 2008).

The Commission granted petitions for discretionary review filed by PBS and Musser. In a two-to-one vote, the Commission found that Musser was a mine operator because it provided more than *de minimis* engineering services to PBS in relation to the Quecreek No. 1 Mine. *Musser Engineering, Inc.*, 32 FMSHRC 1257 at 1266-1270 (Oct. 2010) (opinion of Commissioner Cohen, joined by Chairman Jordan). In another two-to-one vote, however, the Commission found that Musser's "preparation of the Pennsylvania environmental permit map was too attenuated a circumstance to justify imposition of liability for the erroneous mine map under 30 C.F.R.§ 75.1200, even though the location and boundaries of the Harrison No. 2 Mine were identical on both maps. Musser was not involved with the preparation or submission of the section 75.1200 mine map to MSHA. It had no direct control over the submission of the map to MSHA." *Id.* at 1275-1279 (opinion of Commissioner Cohen, joined by Commissioner Duffy).

Although the finding that Musser is not liable under the Mine Act is the law of the case, at least so long as it survives any appeals that might be taken, I respectfully take issue with what I view as a usurpation by the Commission majority of my role as fact finder.[1] In its decision to absolve Musser of any liability under the Mine Act, the Commission majority did not articulate the standard of review under which it reviewed my decision and reached its determination, though Commissioner Jordan, writing in dissent, states quite accurately in my view that the majority "conclu[des] that substantial evidence does not support the judge's determination that Musser can be held liable." *Id.* at 1287.

I found Musser liable under binding legal precedent stating that a mine operator who is an independent contractor can be held liable for violative conditions over which it exercises some control or supervision. *Sec'y of Labor v. Nat'l Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009). I based this finding on undisputed facts stipulated to by the parties as to the degree of control Musser exercised over the ultimate mapping of the Quecreek No. 1 Mine. 28 FMSHRC at 715. The Commission majority, however, summarily dismisses my finding because it is "based on the concept of foreseeability." *Musser*, at 1277. The Commission majority goes on to conclude that "[i]f unforeseeable conduct may not be used as a defense to liability under the Mine Act, then conversely, the foreseeability of injury caused by an actor's conduct should not generally be relevant to establish liability [under the Mine Act]." *Id.* at 22. I could not disagree more with this

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[1] As precedent for my commenting upon the Commission's dismissal of Musser, *see Speed Mining, Inc.*, 28 FMSRHC 773, 773-774 (Sept. 2006).

non sequitor. In fact, the exact opposite is true. While unforeseeability of injury is not a defense to liability, foreseeability of injury *is* evidence of liability. This is so because strict liability subsumes the lesser standard of negligence. Consequently, while foreseeability of the potential injury caused by an operator's conduct need rarely, if ever, be addressed where strict liability applies, such evidence of negligent conduct cannot be ignored to absolve Musser of liability.

What the Commission majority ignores in formulating its broad pronouncement is that this case involves an engineering firm that prepared an inaccurate map that was used as a template for future maps. So long as maps have been made, map makers have held in their hands the fates of countless persons. This "control" is an inherent part of making a map. It strikes me as nonsensical that a map maker should be absolved of responsibility for preparing an inaccurate map because a finding of liability necessarily rests to some degree upon facts establishing that they had actual knowledge that inaccuracies in their map might at some future date lead to catastrophic consequences. Inaccurate maps are, by definition, ticking time bombs, and in fact, the law generally holds map makers to producing maps that "accurately depict what they purport to show" so as to avoid catastrophe. *See Reminga v. United States*, 631 F.2d 449, 452 (6th Cir. 1980) (holding the federal government liable for the death of a pilot who relied upon an inaccurate aeronautical chart produced by the Federal Aviation Administration). I found that the facts here established that Musser knew that if it provided PBS an inaccurate map of the Quecreek No. 1 Mine, catastrophe could ensue. After all, Musser was acting on behalf of companies it knew were in the business of the underground mining of coal – if only by virtue of the names of the companies: PBS *Coals*, Inc. and Black Wolf *Coal* Co. To suggest that Musser could not foresee the uses to which its map would be put by companies who chose to identify themselves with the word "coal" in their corporate names is simply hard to swallow.[2] To suggest that such foreseeability is irrelevant because Musser is held to a *higher* standard of strict liability is incongruous.

The Commission majority cites a case arising under section 404 of the Clean Water Act, 33 U.S.C. § 1344, for the broad proposition that engineering firms should not be found liable when "the firm's work was too attenuated from potential violations arising from the construction work performed [by the firm]." 32 FMSHRC at 1279 (citing *United States v. Sargent County Water Resource Dist.*, 876 F. Supp. 1081, 1088-89 (D. N.D. 1992)). However, as even the Commission notes, unlike the Clean Water Act, the Mine Act imposes strict liability against the operator of a mine in which a violation occurs. Despite this substantial difference in the two regulatory schemes, even if the concepts governing Clean Water Act liability had any relevance to Mine Act liability, the District Court case the Commission majority cites as having a bearing on this case is distinguishable on a number of grounds. Sargent County in North Dakota hired Moore, an engineer, and Radniecki Construction Co. to perform work on a drainage ditch that bisected three sloughs. 876 F. Supp. at 1084. Although Moore "provided drawings to the County . . . *[t]he record shows conclusively that*

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[2] Although the majority opinion states that "[c]learly, PBS knew what Musser knew with regard to the boundaries of the Harrison No. 2 Mine," Tr. 144-46, one of these two Commissioners states elsewhere in his dissent: "Moreover, whatever personal doubts Mr. Lucas [a technical assistant employed by Musser] might have had, his testimony does not indicate that these concerns were shared with PBS." *Musser*, at 1298.

Moore's drawings were not relied upon by the contractor [Radniecki Construction]." *Id*. at 1088 (emphasis added). Nor did Radniecki rely upon stakes placed by Moore. *Id*. at 1089. Clearly, here, it is beyond dispute that PBS relied very heavily upon the mapping done by Musser. In addition, the *Sargent County* case did not involve the lives of workers placed in the utmost peril by a string of events and failures to act set in motion by the preparation of an inaccurate map, and should not be relied upon for controlling guidance.

This record offers substantial evidence for the conclusion that Musser had sufficient control over the ultimate contents of the section 75.1200 map, at least at it pertained to the adjacent workings.[3] When the Commission dismissed my findings, its determination, in my view, set aside the settled principle of law that the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

A unanimous Commission also remanded this case to me for the purpose reassessing a penalty against PBS. The Commission explained: "In finding that the $55,000 penalty was appropriate considering the size of PBS's business and its ability to stay in business, the judge erroneously based his conclusion on the stipulations, which were entered into on the basis that the penalty would be $5,000. It is apparent that, given the judge's substantial increase in penalties for PBS, he did not give PBS an adequate opportunity to address the two criteria once the proposed penalty was increased." *Musser*, at 1290.

After the parties were directed to address these two points, the Secretary stated in an email that "PBS and the Secretary have agreed to enter into the following stipulation: 'Payment of a $55,000 penalty would not affect Respondent PBS' ability to remain in business.'"[4] I therefore find that imposition of a penalty in the amount of $55,000 will not affect the ability of PBS to stay in business.

The parties also provided data on the size of PBS which are not relevant to determining the company's size for purposes of assessing a penalty. The data relate to production, but PBS does not

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[3] As Chairman Jordan noted in her dissent, the record provides substantial evidence for the conclusion that "Musser was in a position to prevent the errors on the section 75.1200 map because Musser created, certified, and sealed the permit map on which the section 75.1200 map was based. Musser knew that even though its map would not specifically be submitted to MSHA for the requirements of section 75.1200, the research and plotting of the Harrison No. 2 Mine and the hydraulic barrier line would be used in creating future maps of the Quecreek No. 1 Mine. By sealing the permit map, Musser verified the map's accuracy. 28 FMSHRC at 716." *Musser*, at 1277.

[4] Email from Timothy Williams, Senior Trial Attorney, U.S. Department of Labor, to Chief Judge Robert J. Lesnick, copy to Ralph H. Moore, attorney for PBS Coals, Inc. and Marco M. Rajkovich, attorney for Musser Engineering, Inc. (November 12, 2010, 19:35 MST) (on file with FMSHRC).

produce coal, so the data are necessarily comprised of zeros. Instead, PBS performed engineering and permitting work at the Quecreek mine. For purposes of assessing a penalty, I find that in light of its ability to pay a penalty of $55,000, PBS is a medium sized operator, and that a penalty of $55,000 is appropriate to its size.

Although in light of these findings, I have followed the directions set forth in the Commission's remand order, I note that when the Secretary stated in her reply brief that a penalty of $55,000 was warranted, the burden was placed upon PBS to file an objection and offer of proof that such an amount would affect its ability to stay in business. The company's failure to do so led me to presume that no such effect would occur, this in keeping with well established Commission precedent. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983) ("[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur."), *aff'd* 763 F.2d 1147 (7th Cir. 1984); *accord Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (Apr. 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994).[5]

ORDER

Consistent with this Decision, **IT IS ORDERED** that PBS Coals, Inc., shall pay a total civil penalty of $55,000.00 for the violation of section 75.1200 set forth in Citation No. 7322488.

Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, the captioned civil penalty matters **ARE DISMISSED**.

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[5] By the Commission's logic, a judge is barred in most cases from raising a penalty unless the Secretary so moves -- or the judge will face a remand. As any contested penalty may be raised and subjected to a hearing de novo, any operator should be aware that once contested, any penalty may fall to $0 *or be raised to the maximum by the Judge sua sponte*, which, in this case, was $55,000. The notion that the company should have no expectation of paying a penalty higher than that initially recommended by MSHA invites the increased contest of penalties.

Robert J. Lesnick
Chief Administrative Law Judge

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